LAW
FROM ANARCHY
TO UTOPIA

An Exposition of the Logical, Epistemological and Ontological Foundations of the Idea of Law, by an Inquiry into the Nature of Legal Propositions and the Basis of Legal Authority

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PREFACE

Above the magnificent entrance to the Central Secretariat in New Delhi is inscribed in bold letters: 'Honour the State, the Root of Law and Wealth'. The Secretariat forms an extension of the President's house—a majestic symbol of the sovereignty of the people. The fate of millions of common people is regulated from this Secretariat on the basis of the philosophy which its entrance so clearly proclaims. Although thousands of Indians pass this way, not many notice the proclamation. They may as well not, for after 200 years of English education this principle seems to have become equally solidly inscribed in their hearts.

The English could not have chosen a more appropriate statement to convey their message. For, in a most profound way, it embodies a whole philosophy about the relationship between state and law and the conditions for its material prosperity. However, from the Indian point of view, the statement is unfortunate, being at complete variance with the wisdom that the subcontinent has gathered over many centuries, a wisdom which has grown out of resolutions to conflicts between incoming and indigenous communities since time immemorial. In accordance with *this* wisdom the statement should appropriately read: 'Honour the Law, the Root of State and Wealth'. Not any arbitarily legislated rule, of course, but only that law which is *dharma*.

My work is an attempt to re-establish this wisdom and advance its depth as much as possible. It assimilates the communal experience of the past, including the immediate past—the experience which the English brought to India. Indian work in the *dharmasastra*, the philosophy of law, cannot any more be done by a mere exposition of works of the past if it is to be of any use for contemporary problems. To undo the basic principle which now seems embedded in the Indian mind and which expresses itself at the seat of government, one has to face up to the entire Western tradition which lies behind this principle. Only by seeing through Western social ideologies and outgrowing their dominance, both emotionally and in thought, can one begin to see the real worth of some of our own past discoveries, and also the actual methods by which they can be advanced in modern times.

This work therefore scrutinizes the central ideas of Western thinkers. My critique of these thinkers derives its life from some basic ideas of Indian thinkers, especially those of the traditional *Dharmasastra, Nav-Nyaya, Sankhya* and *Vedanta*. However, Indian thinkers and their works are not mentioned in the text of this book. Discussing Indian philosophers was thematically possible, but a simultaneous discussion of Western and Indian thinkers would have enlarged the intellectual terrain unmanageably, and this would not necessarily have been helpful in so far as my main aim is to characterize the idea of law and not its comparative history. The Indian historical situation necessitates that the modern *dharmasastra* must advance by first refuting false western views and assimilating correct ones before advancing Indian thought from within. This perhaps is the predicament of all Indian philosophies. My work, which attempts to explicate the nature of law in all its deeper aspects, thus hopes to make place for the rise of true *dharmasastra*, a true philosophy of law, in India and elsewhere, once again.

The suggestion of a 'true' *dharmasastra* or philosophy of law may sound nebulous, but is not. In this century it has become unfashionable to ask basic metaphysical or transcendental questions about law. Inquiries into the nature of law are arbitrarily terminated at the level of rudimentary metaphysical or epistemological assumptions. But the human mind as I understand it will not rest until it comprehends the deepest reasons for any phenomenon. For this reason a return to metaphysics is inevitable, however much we may presently shun it on account of philosophical or jurisprudential conventions, or peer pressure in academics. A true philosophy of law must necessarily probe into all the basic philosophical issues about law without laying any a priori or conventional limits to the depths or directions of inquiry.

The usual reason behind writing philosophies of law 'unphilosophically' seems to me to be two-fold: methodological and historical. First, the evolution of legal positivism is not unrelated to the evolution of logical positivism. The latter's polemics against metaphysics have affected the methodology of all social sciences, including theorizing about law. Added to this are some basic misunderstandings about the scope of the natural sciences, whose methodology too has greatly influenced social inquiries. Second, the historical factors which provoked inquiries into the nature of law in this century have hitherto not been of the type that required soul searching, so to say. They have been more of the type that draws attention to the nature of efficacious legislation and politics rather than to the nature of law itself. Inquiries into the conditions for efficacious legislation are concerned more with legitimation, enforcement and validity of politically framed rules, rather than with the basic reasons which lie behind laws. This seems to be true for the rise of both 'liberal' legal positivism—which was involved in building empires and regulating them through law—and Marxist positivism—in which people have been involved in regulating their own society through law.

These remarks are not meant to underestimate the value of studies which inquire into legitimation conditions for politically legislated rules, but only to point out that they cannot be substitutes for equally necessary philosophical inquiries into the nature of law which explain the basic reasons that lie behind legal activity.

Historically, philosophy of law has never been a mere intellectual exercise; nor has it been a search for knowledge for knowledge's sake, for it has immediate practical consequences. The search for knowledge has always been for self-liberation or for the liberation of society. However, something more specific needs to be said concerning the search for knowledge as it pertains to the amelioration of society through law.

The conditions for the growth of philosophical knowledge are different from the conditions for the growth of scientific knowledge, especially of that philosophy which is at the root of social organization and development. Philosophy of law must take priority over all social philosophies because it discusses the conditions of peace and justice which are necessary for economic, political, religious, scientific and cultural growth, including the growth of all other social philosophies. Some knowledge of basic universal principles of law and its theory becomes available when different communities come in conflict and are forced to search for those principles in accordance with which they can retain their identity and develop peacefully towards a just society. Under conditions of conflict it becomes necessary to question common intuitions and express them in ways which harmonize with the intuitions of other communities. The *ius gentium* of Roman law was one such expression, as was the *ius naturale* of the *logos* of the Stoics. The concepts of *dharma* also tended towards such an expression. Lately, when different nations have found a common platform to resolve their conflicts in the UNO, they have once again begun to discover the universal principles of law. These intuitions are expressed in the Human Rights Declaration and other similar documents of International Law. All such charters, however, presently lack a satisfactory legal theory which can justify them. This work, which arises out of communal conflicts in India, including conflicts between traditional Indian views and modern Western thought, attempts to provide the necessary theory which can explain and justify not only municipal laws but also those which apply to all communities.

The growth of legal knowledge is not continuous. It develops under conditions of the tolerant and reasonable resolution of conflicts. But when a particular community with a non-secular and non-tolerant ideology becomes dominant, the growth of legal knowledge suffers. This has happened frequently in the course of legal history, and it happens now with the dominance of legal positivism.

In a land of diversity where different communities survive without destroying each other's identities what one needs is a system of law and its theory which will not only apply to diverse cultures but also allow for their peaceful development. Such a theory, evidently, cannot be based solely on the religious or ideological beliefs of any one specific culture. Nor can it be based on the social structure of a particular community. It can only be based on those methods of gathering knowledge and those practices which are commonly available to all individuals and communities, irrespective of their religious or cultural beliefs. Since India already allows for a unity while retaining its diversity, providing a philosophy of law for it presents a formidable task to any philosopher. The success reached in such a context is obviously also of relevance to any nation which wishes to allow the growth of diverse cultures within its jurisdiction. In so far as the world community wishes multi-culturalism to prosper, Indian solutions are also its solutions. Neither mere revivalism of past Indian views nor dogmatic acceptance of modern Western thought will, I think, suffice for the needs of pluralistic and tolerant societies (or at least those that wish to be so). It seems important to attempt to seek new alternatives in legal theory which will accommodate the novel requirements of pluralistic societies. I am hopeful that this work will at least set the stage for such an enterprise.

As against the dominant legal positivism which bases law on the will of some people, philosophers have sought to discover universal principles of law by probing into nature, including human nature. They have thus come up with various natural law theories. But these are not the only two alternatives—as philosophers of law commonly seem to assume. In between these two theories lies the third alternative which looks for the substance and justification of basic laws in the communal mode of human existence and the teleology of its development. It is this third alternative which has seemed to me the most promising direction needing critical exploration.

The belief that there are some basic laws governing the communal mode of existence which can be justified independently of all political contingencies, and which apply to all legal entities, including the sovereign, has been an emphatic assertion of both several Western thinkers and, more predominantly, of Indian jurists such as Manu, Kautilya, Yagyavalika and Medhatithi. In a general way this has been one of the dominant themes of Hinduism and has expressed itself more or equally emphatically in religions which arose out of it—such as Buddhism, Jainism and Sikhism. This belief has expressed itself as the notion of *dharma*, which, when better understood, is different from the notions of both positive law and natural law. However, this belief has not received substantive explication. It has often lapsed into natural law theories in which some basic principles derive their justification as *rita*—natural principles applicable to classes or to nature. My work involves a restatement of some basic Indian concepts, including that of *dharma*, within a reformed Western perspective, mainly Kantian. It seeks to demonstrate the usefulness of these Indian concepts in deepening our understanding of law, as also that of the Kantian framework in giving a richer and more appropriate meaning to them. The occurrence of Indian concepts in this work is hence not just referential but substantive, in so far as in deepening its own meaning each concept deepens the meaning of law.

There is another aspect which makes my work basically Indian, although this again is not expressed in specifically Indian terms. This aspect concerns methodology. Indian philosophers, especially of the *Nyaya* school, have always recognized that every branch of knowledge must have its own theory of proof, *pramansastra*. Unless there is a clear method on the basis of which the axiomatic principles of a science are chosen, both in their form and in their content, there can be no resolution to the conflicting claims about which are and which are not the basic propositions of that science. The axiomatic principles of legal science are expressed as 'secondary rules', *grundnorm*, or natural law principles. All legal theories have hitherto lacked an explicit theory of proof in accordance with which one can decide which are basic legal propositions so as to distinguish them from derivative ones. Such basic legal propositions would be foundational in the sense that they would form the ground beliefs on which, epistemologically, legal science is to be constructed. Methodologically, such a theory of proof is absolutely necessary if one is to decide between different theories, all of which contend to be about law. In this work I attempt to provide the necessary *pramansastra* by making some fundamental revisions in Kant's epistemology.

In the Western tradition Kant also provides us deep reflections on universal principles of communal life and its teleology. His work was a development upon the views of Leibniz and Rousseau. Lately, Lon L. Fuller has reflected in a similar manner. However, in comparison to Kant, his inquiry is limited in scope and depth. To my understanding when Fuller's analysis is taken towards its logical consequences it will lead to the Kantian alternative, although Fuller himself leaves this possibility unexplored in the end. In this work I therefore explore this third alternative between legal positivism and natural law which Fuller suggests but leaves unexamined.

A few words about the title of this work: a description of the idea of law is not the same thing as a description of how this idea evolves in social reality. A description of the process of evolution would form an account of the dialectics of law—about how rules, customs, conventions and policies evolve to become laws and what forces are at work. This work is not about the process of that evolution. It is about the reasons for that evolution and the ends towards which that evolution is taking place, as well as about the methods by which this can happen. Any attempt to understand how rules, policies, etc. transform themselves to either just laws or exploitative measures assumes that we have separate criteria and a methodology by which we can understand what just laws are as distinguished from exploitative rules or customs. These separate criteria and methodology which are presupposed in any account of the dialectics of law amount to a theory of the idea of law. By observing all that goes under the name of law in a society—as did Karl Marx and Max Weber, for example—one may indeed learn a great deal about fair or exploitative situations in society. But to relate all such situations into a coherent whole and to understand the reasons behind this coherence as well as the reasons for transformations towards this coherence, one needs a different theory: a theory which is about the whole and not just about the parts. A theory about the idea of law is precisely such a theory of the whole. It is just this type of theory which a Marxist or a Weberian analysis will require when it discusses specific situations of exploitation or fairness so that it can fit those situations into a holistic framework within which their fairness or exploitativeness can be shown. I am not suggesting that the Marxist or Weberian analysis of law is only about its dialectics. As noted earlier, any account of the working of law presupposes a minimal clarity about the idea of law. All I am suggesting is that a theory of the idea of law is different from a description of the social transformations in which law plays a part. We shall see subsequently what idea of law Marxism presupposes, and whether it is tenable. I intend to discuss the dialectics of law in a separate work.

It would be fruitful to turn to Hegel, Marx and Weber to examine the dialectics of legality. The Marxist analysis is most revealing and I find myself sympathetic to it in so far as it clearly brings out the manner in which dominant classes exploit others in the name of the law. But exploitation in the name of the law is one thing and the true nature of law another. These philosophers are not discussed at length in this work because they have told us more about social dialectics and the role of law in it and less about the nature of law. I am more centrally concerned with that social idea of human reason which, when misunderstood, misconstrued or falsely propagated, allows for the exploitation of one by another. The idea of law, when understood and practised correctly, provides the very ground for the negation of exploitation. Any deviation from it generates social pathology. Marxism offers a better account of this pathology than of the idea of law. In so far as it presupposes something of the idea of law, I have discussed it.

Marxist presuppositions pertaining to the concept of law are not as complex as is sometimes assumed. Hence the discussion of Marxism is limited in this work; it deals only with its presuppositions concerning the idea of law and not with its account of dialectics or pathology. Can one be both sympathetic towards Marxism and a liberal? I would answer by emphasizing that in this work I attempt to present a new, and what I take to be correct, theory of law, which is as weary of the exploitation that takes place in the name of the law as Marxism. My account of law is not antagonistic to the Marxist analysis of social pathology; in fact I think it will be required by it. But unlike Marxists I do not think that true law either will or ought to wither away. The truth of the matter, as I see it, is that only a society based on an appropriate liberal theory can realize an egalitarian and non-exploitative society—including the type which Marx envisioned.

I do not see Marxism and assumedly liberal theories such as those of Hart and Kelsen as rivals competing in the same field. Whereas Hart attempts to present a theory of law, the main thrust of Marxism is to present a theory of exploitation. These are different tasks. The difference between Hart's and Marx's theories may be undestood by analogy as the difference between money and counterfeit money. A theory that explains what money is, is very different from a theory that explains how counterfeit money works. Marxism, I contend, is unable to distinguish counterfeit money from the real thing. However, its account of how the false thing works is invaluable for understanding and regulating the real thing. It is a different matter that Hart, Kelsen and others are also unable to explain the working of real money, i.e. the law.

Marxism, I think, would not err by mistaking all that goes in the name of law with genuine law if it asked itself a basic question: how is exploitation in the name of the law possible? The working and organization of every society necessitates the acceptance of some rules, only some of which are laws. These laws form the basis on which a group of people can be a society. Hence there must be a general willingness to accept them. The rules which hold the people together are principles of *dharma*. Precisely because some people know that everyone knows there must be such rules—and willingness to accept them—they are able to legislate exploitative rules and deceive people into believing that they are laws. That is, the practise of exploiting people through legislated rules presupposes not only the existence of laws but also a willingness to accept them, just as black-marketeering succeeds due to the existence of a legal market, or as lies succeed due to the general practice of truth telling. In fact in each case the possibility of dishonest practice presupposes a prior existence of honest practice. Marxism's demonstration that people are exploited through legislated rules only proves that there must be a genuine set of rules which can and must qualify to be laws.

Deviations from the idea of law which lead to social pathology create an anarchic state of affairs. Anarchy is not merely a state in which law and order break down. This is a misleading way of putting things, and not without reason. Order can be achieved in many ways: through compulsion, brainwashing, conditioning, deception or religious conviction. Only one sort of order is a legal order. Hence there can be order even in the absence of law. But all such non-legal orders which are not based in human rationality and co-operation will be pathological, because they will deprive people of freedom and retard natural growth. Such is the case, for example, in colonies where order is maintained through force. Anarchy, thus, is not merely a question of disorder but also of orders which are pathological. If people are not allowed to develop socially, culturally, economically, scientifically or otherwise, and if order is maintained through coercion or deception, greater disorder results when people realize their deprivation. Pathological orders, whether they be maintained through colonialism, imperialism, dictatorship or straightforward repression, are as much conditions of anarchy as are acts of terrorism or guerrilla warfare. The difference is that whereas terrorism brings about disorder quickly, pathological order brings about greater disorder in the long run. In all anarchic states the idea of law is either misunderstood or misconstrued. Such states, evidently, do not provide the conditions in which a legal order can be realized.

A totally non-anarchic state of affairs within society is what I call utopia. By this I do not mean some fictitious realm, but simply the best normatively possible social realm which all rational human beings intend to (or hope to) realize on earth some day. It is neither the task of law nor of legal theory to tell us in substantive terms what this best social system is or will be. Poets, novelists, science-fiction writers and political theorists are engaged in this task. A legal theory can only tell us the rational provisions (in terms of legal principles) in accordance with which conditions can exist that are conducive to the realization of the best social system, whatever name one may give it. (I use the term utopia because it succinctly conveys the general intent.) This work, then, spells out the legal conditions for utopia. The desire to create the best social system or utopia, as I shall show, is as much a part of the idea of law as any other; and both the ideas of law and utopia are equally necessary and worthy products of human reason. One who understands the idea of law as a consequence of this work will, I think, understand the degree and limits of legality in both anarchy and utopia.

As I said earlier, the Indian background from which I draw inspiration to make my criticisms are not discussed in this work. A detailed account of this would not have been possible without writing another book. However, it may be useful to mention my sources briefly. These remarks are merely indicative of the direction of my thoughts and only mention schools and arguments.

My cognition of the relationship between *dharma* and *ahimsa*, by studying *dandaniti* in the *dharmasastras* and theories of evil in the *puranas* and the epics, results in my separating coercive forces from the law. *Dharmaniti* (legality) works through *ahimsa* (non-violence), and *himsa* (violence) is possible in *dandaniti* (principles and justification of coercion) and through *rajaniti* (polity). The distinctions between *dharmaniti*, *dandaniti* and *rajaniti* are implicit in *Manusmriti*, Kautilya's *Arthasastra* and other *dharmasastra* texts. Whereas Western thinkers relate *dandaniti* to *dharmaniti*, the general Indian tendency is to relate it to *rajaniti*. I have done the same but given it a different interpretation. The sources of my learning about *ahimsa* are Jain, Buddhist ethics and Gandhi.

My cognition of possible worlds has its roots in *Samkhya* philosophy, which sees a continuity in the development of the substance (*padartha*) of the world, and in which the different *mahabhutas* (evolutes) are not only related but also dependent on each other. However, unlike *Samkhya*, I do not stop with the differentiation between *prakriti* (matter) and *buddhi* (consciousness), but relate the different *buddhis* in a common *mahabhuta*: the *samsar* (the social realm). But like other *mahabhutas* the *samsar* is not only related to other *mahabhutas*, such as *prakriti*, but also dependent upon it.

The conception of the self emerges from *Advaita-Vedanta*. I accept the *Vedantic* position that there is an ontological continuity between the *brahman* (or what the *Samkhya* calls *padartha*) and the individual self, including the belief that the ontic status of the being depends upon its epistemic status which can be transformed through action in the process of becoming. But such a relationship between being and becoming is untenable if one believes that the essence of the self precedes its existence—a view which some form of *Vedanta*, such as that of Sankaracharya, seem to hold—since then any becoming will be metaphysically unnecessary, the full essence already being realized. Moreover, such a view of the self leads to 'metaphysical individualism', the belief that the essence of the self can be understood without understanding the nature of the realm in which it operates, namely the social realm. I do not accept this view. Its misconceptions about the nature of the essence leads it to divorce *jnyanan-marg* from *karma-marga* (the path of realization through knowledge from the path of realization through moral action). I have attempted to reconstruct the *Vedantic* notion of the self as well as to give it a social interpretation such that the realization of its individuality or essence becomes as much a matter of social action as of search for truth. Such an interpretation of the self, which unites *karma* and *jnyanan margs*, was, I think, attempted by Aurobindo Ghose in his analysis of *Vedanta*, and I have greatly benefited from his works. In working out the social dimensions of the notion of the self, however, I am more influenced by Buddhism than by *Vedanta*, not by its metaphysics but its ethics, which makes righteous social action in *samsar* the central aspect of *dharma*. Such a view, however, requires a specific notion of *karma* (actions in the social realm) such that the *ataman* can realize its essence by acting according to *dharma*. In other words the acceptance of *Vedantic* metaphysics of the self and Buddhist ethics for social action necessitates a particular interpretation of the notion of *karma*. I have attempted to reconceptualize this in the required manner. All these various reconstructions and reconceptualizations are not done merely for the sake of consistency, but because the very nature of the idea of law demands them. No legal theory, specially its theory of punishment, can do without a theory of the self (*ataman*) and a theory about what constitutes a legal course of action (*karma*). As I have argued, such theories must be of the type suggested in this work.

The influence of *nyaya* would be evident in my epistemology. Its emphasis on a theory of justification (*pramansastra*) as a foundation of any *sastra* leads me to discuss the nature of *vyapti* (generality of application) of the *dharmavakyas* (legal propositions), and distinguish them from *vyavaharvakyas* (conventional definitions). Some *dharmasastris* took all legal propositions to be *vyavaharvakyas*, but the distinctions between *vidhivakya* and *dharmavakya* and *vyavaharvakyas* is endemic to *Purva-mimansa* and the subsequent *Navya-nyaya* schools. I have also learnt from the works of Bharthari, Mukul Bhatt and other Grammarians in this respect. Locating exact parallels and differences here would be an arduous task. I leave it to readers, and to myself for later work.

In befriending Kant I have suffered a fate similar to his: of having to write a long preface to explain my own work. This is because the work has been in circulation before its publication and I have had the benefit of some reviews. On the basis of these I have tried to construct a preface which will, hopefully, increase the intelligibility of this work. I must also say in the light of this that the architectonics of this work is not arbitrary, although it may seem so prima facie. As much thought has gone into systematizing the whole work as in its substance. Each part is carefully structured and related to other parts. The reader will find many cross-references to the parts, to and fro. This is to help the general reader relate the parts, since the work is large. I seek the indulgence of readers for whom such cross-references are unnecessary.

From the point of view of pedagogy, this work is presented to simply read as a text on the idea of law. I hope it will be helpful to students of law and philosophy as well as to political and social scientists. Since I have argued my case mainly with reference to Kant, it has been necessary not only to discuss his arguments in detail but also to refer to much of his work. As such, this book is as much a study of Kant as of the idea of law.

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Chhatrapati Singh

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INTRODUCTION

I

Law gives a form and direction to the social world. The factors determining the continuity of a society, however, are not all legal. Political and economic changes sometimes disturb legal relationships in fundamental ways. This makes it necessary to reflect on the very meaning of a legal enterprise.

The past century-and-a-half has witnessed various significant political and economic changes and together with them numerous attempts to inquire into the nature of law. Among such attempts the theories of John Austin, Karl Marx, Hans Kelsen, H.L.A. Hart and Lon. L. Fuller are noteworthy. This work also inquires into the nature of law. It once again raises and attempts to answer the basic philosophical question: what is law?

Various legal systems have many elements in common. All such common elements can be said to belong to the idea of law. Everything that belongs to the idea of law is not to be found in every currently existing social institution that calls itself a legal system. Some have many elements and some have only a few. Since the existing social systems which call themselves legal systems differ in significant ways, it becomes necessary to clearly characterize the idea of law so as to distinguish it from other related notions. This work is an attempt to explicate what belongs to the idea of law.

I am using the term 'idea' in the Kantian and not in the Platonic sense. In the Kantian sense the idea of law does not exist in some other realm. It is a notion provided by our reason for directing human actions to a goal in a systematic way. Unless we have a clear conception of what is contained in the idea of law it will neither be possible to appraise different social systems that claim to be legal systems nor will it be possible to direct the development of any such social system towards greater perfection. Any attempt to better an existing legal institution presupposes a basic understanding of the idea of law.

II

The basic motive in undertaking this enterprise is my serious dissatisfaction not only with the traditional natural law theories but also with modern legal positivism such as that of Hart and Kelsen. Recent works by Joseph Raz[1] or John Finnis,[2] for example, seem to accept some basic assumptions of legal positivism and natural law theories which I find highly questionable. I find myself more in sympathy with the views of Fuller but his analysis does not seem to have gone deep enough in characterizing the basic principles of law. In the final analysis, as I shall attempt to show, Fuller's theory is unable to bring out the morality that is involved in law.

There is a second but less urgent factor that motivates this work. The desire to systematize the elements and the problems involved in a legal theory. In so far as law is a system it should be possible to distinguish foundational elements from derivative ones. Moreover, it should also be possible to describe the relationship that holds between the different parts of law, such as criminal law, constitutional law, law of contracts, law of persons, etc. in some related and orderly manner. In the existing legal theories the relationship between the parts seems to be only intuitively intelligible. The reason behind such conceptual discontinuities seems to be the fact that most legal theorists have tended to follow the traditional and historical compartmentalizations of law instead of the conceptual and thematic necessities dictated by reason. I shall attempt to describe the nature of law systematically, distinguishing basic elements from secondary ones. Such a method requires that I follow a conceptual order in describing the parts of law rather than historical ones. I shall explain the manner of such a presentation subsequently while describing the plan of the work.

These remarks on systematization make it clear that I take a kind of foundationalism to be true for law.

III

The philosophical background from which I approach the analysis of the idea of law derives its elements more from the Indian than the Greek tradition of thought. From such a perspective I perceive the issues and the problems in some very different ways. However, as will be evident, the Indian tradition stays as a background within this work. Only the arguments of some western thinkers are analysed. The critique of each argument, however, has its roots in some Indian views.

Although I find myself in disagreement with Austin's, Hart's and Kelsen's views, it must nonetheless be emphasized that in spirit I see my endeavour as continuous with their efforts in so far as it concerns an attempt to purify law from extraneous elements. Austin, Kelsen and Hart do not, however, seem to me to have succeeded in their endeavour. The basic reason why they have not succeeded in purifying law of extraneous elements is that they seem to have misunderstood the basic moral reason for trying to arrive at a pure theory of law. The task, as will be evident, is not just one of theoretical niceties but of practical consequences.

Following the work of Bentham and Austin, the task of trying to purify law of morality seems to have become a common enterprise. However, considerations of the actual social and political ends that led Bentham and others to distinguish law from morality have generally been neglected. It is known that Bentham, Austin, James Mill, J.S. Mill, James Fitzjames Stephens and others who have theorized in detail about law were actively involved in structuring the societies of the English empire by means of law. Many of their central theories had their roots in practical problems they confronted in such activities. The actual influences of these activities on their theories is a matter of historical research, but if one turns a blind eye to the fact that all their theories were designed to meet some practical difficulties, some essential links in understanding the development of their theories will be missed.[3]

The assumption that one can distinguish law from morality is only plausible in a theory of law like that of Austin's. According to Austin law is what the sovereign commands. But suppose there are limits to what the sovereign can command to be law, such as that only that which ought to be law can in fact be law, then Austin's distinction between law as it ought to be and as it is would not hold.

If the distinction between law and morality is tenable only by arbitrarily equating law with the dictates of someone's will, one must ask what advantage, if any, is gained by defining law in this way. There is one straightforward practical consequence of this definition. By telling people that law is whatever the legislator commands it to be and that there is an obligation to obey it, the activity of governing becomes much easier. For then any and every violation of what the legislator commands becomes a case of disobedience against which force may be used and claimed to be legitimate. Moreover, such a definition of law gives complete freedom to legislators.

Now this is just the kind of theory that one would need for all colonial and imperial purposes where one wants to give complete freedom to legislators to frame rules and justify the use of force against every violation. The point however is not about the practical use and misuse that legal positivism has been put to but about the fact that the various distinctions, such as between law and morality, which legal positivism makes cannot be fully understood if one ignores the actual social context of such distinctions.

There is no reason to believe that Bentham and Austin were motivated by a desire to enhance the power of the legislators, although James Fitzjames Stephens clearly seems to have been so motivated.[4] There is another and more significant purpose desired by legal positivists in distinguishing between law and morality. This purpose, they have claimed, is to keep open the possibility of a moral appraisal of law. Positivists believe that only by maintaining a sharp distinction between law and morality is such an appraisal possible.[5]

Suppose we do grant the positivist thesis that law is to be appraised by morality, the next natural question is: by which morality? Is the English legal system to be appraised by Chinese morality? Or is the Americal legal system to be appraised by Hindu morality? If we suppose that all legal systems are to be appraised by the morality that emerges from the Judaic-Christian-Islamic system of thought, why is the morality that emerges out of the Buddhist and the Vedantic systems incapable of serving the purpose? As far as I know, no legal positivist has attempted to justify the morality by which law is to be evaluated.

To say that we evaluate law, as the positivists claim, is to assert a complex and misleading statement, for what we in fact evaluate is only the statements of legislators. Only if we characterize as law everything that the legislator legislates can the statement be made that every time we evaluate what the legislator proposes we are evaluating law. However, such an assertion already presupposes legal positivism to be true.

We do indeed need to evaluate what the legislator legislates, but the possibility of such an evaluation does not by itself require that we separate law from morality: it only requires that we separate what the legislator legislates from morality. We actually need a better understanding of law so that we can differentiate laws from non-laws when the legislator legislates. The positivist claim that we need to distinguish law from morality so as to evaluate law is based on a confusion which arises because they presuppose their own theory to be true in the first place.

An appropriate legal theory should make possible a moral evaluation of valid legal rules legislated by the authorities and also at the same time be able to show the moral ends and means of law. I will attempt to achieve such a synthesis.

If law is not to be separated from morality in the way that legal positivists have generally demanded, what is it to be separated from? I shall argue that law needs to be purified first of political elements and second of religious elements. In other words the basis and the function of a legal system must be distinguished from those of political and religious systems.

To suggest, as I am doing, that law is related to morality is to say little so long as morality is left undefined. In this work I seek to define the morality in which law is necessarily grounded. No claim to completeness can, however, be made in such an enterprise. This work represents only a beginning in what seems to me to be the right direction towards the moral foundations of law.

But where must one start the inquiry about the morality that is involved in law? It is my opinion that for deeper considerations about law one must return to pre-colonial thinkers, mainly to Kant and Leibniz. There are many reasons why the development of legal theory in Europe took a new and, as I shall argue, mistaken direction after Kant. The chief reason seems to be that the major political preoccupation of Europe in the nineteenth century after Kant's death was with imperialism and expansionism. Such activities call for greater attention upon the theory of the state since, where new states are being created, there is a practical necessity to conceptualize and justify certain activities. On the other hand such a political atmosphere is hardly conducive to the drawing up of a Kantian scheme for the civil state, in which the Republican civil state, as a legal state, cannot act without the people's consent and knowledge.[6] We have already noted how the main proponents of legal theory in Europe after Kant were directly involved in building very un-Kantian civil states.

IV

In terms of content there are two aspects to this work. The first is that this work is mainly a criticism of legal positivism. The second consists of a presentation of what seems to me to be the right account of the nature of law. The strategy hence is essentially one of presenting my own view by criticizing other important views. In terms of presentation the work is divided into four parts. The reasons for this will be explained in the plan of the work.

The legal positivism that I criticize in detail is that of Hart and Kelsen. This is so because they seem to me to have presented the two most sophisticated versions of this theory. Two less sophisticated versions of legal positivism, one ideologically to the right—that of Ronald Dworkin, and one ideologically to the left—that of Karl Marx, are also discussed.

I shall attempt to show the correctness but the inadequacy of Fuller's theory. When Fuller's point about the internal morality of law is pursued it leads towards the Kantian alternative. The theory of law that I present will be based mainly on Kant's and indirectly on Leibniz's moral and legal theories. I will attempt to show that an appropriate legal theory can be developed by revising some of Kant's essential beliefs. Such a revision, however, must necessarily include some important tenets frequently put forward by Indian thinkers. I have choosen to direct my arguments against Kant and build an appropriate legal theory in contrast with his views mainly because he seems to me to present the most detailed and the most formidable arguments which need to be taken account of.

There have been controversies about the correctness of legal theories for a long time. By what method or on what grounds is one to distinguish between different legal theories which claim to be true? The answer to this question forms the central methodological feature of this work.

I shall argue that the right and perhaps the only way to resolve the conflict between different theories of law is to investigate the epistemological status of basic legal propositions. Let us examine the nature and status of basic legal propositions which we expect would serve the central aims of legal enterprise, such as bringing about justice and order, and then let us see whether the propositions asserted by different theories to be basic legal propositions have in fact the epistemological status and nature of the type which serve legal ends.

The basic point of conflict between different legal theories is their view of the basis of legal authority. The inquiry into the epistemological foundations of law helps to resolve this conflict by providing the appropriate grounds for the basis of legal authority. Different types of propositions have different truth and justification conditions. Once we know the status of basic legal propositions we can know the valid or true conditions under which authority can be assigned to people to legislate legitimate propositions.

The answer to the question about the basis of legal authority, as I shall argue in detail, is not independent of the answer to the question about the nature of basic legal propositions.

It must be emphasized that although there are three related issues to be tackled—the resolution of the conflict between different legal theories, the nature of basic legal propositions, and the basis of legal authority—these are not three distinct problems to be solved. They are only three different aspects of one enterprise. Knowledge about the nature of basic legal propositions will tell us the justification conditions for assigning authority to someone to legislate. The decision about the basis of authority will resolve the conflict between different legal theories.

The basis of authority that this work inquires into is *de jure* authority and not *de facto* authority. In recent times the different senses of authority have also been expressed in other related terms. Distinction is made between authority in the sense of 'epistemic' authority which pertains to beliefs and knowledge, and 'moral' authority which pertains to decisions and actions. People such as scientists and mathematicians are supposed to have epistemic authority and people such as the priest are said to have moral authority.[7]

The way the distinction between epistemic and moral authority is presently made assumes that to have moral or *de jure* authority one does not need knowledge. But is such an assumption philosophically warranted? On what grounds is one justified in believing that moral or *de jure* authority does not require any sort of knowledge, and that it is not epistemic authority in some sense? The very distinction reflects a current dogma of the Western mind. The belief that *de jure* or moral authority is distinct from epistemic authority goes against a fundamental Indian outlook. I accept the common Indian view that *de jure* or moral authority is also epistemic authority, albeit the knowledge involved in law and morality is of a different sort. Knowledge and action are related, whether it be scientific activity or legal activity. By working out the epistemological status of basic legal propositions and by showing their relationship to the basis of legal authority I shall be showing the relationships that obtain between epistemic or *de facto* authority and moral or *de jure* authority.

The justification of authority is based on a normative theory grounded in the philosophical assumption that ethics involves knowledge of objective values in such a way that ethical differences are, in principle, subject to resolution by rational inquiry and debate. The arbitrary distinction between epistemic authority and moral authority that characterizes the present Western mind has not always existed. Conservative political thought, characteristic of the traditional Republican in the United States, has to a considerable extent remained committed to the rationalistic theory of ethical knowledge assumed by the founding fathers of the American Constitution. However, under the impact of logical positivism and empiricism, which seem to have entertained some basic misunderstandings about the nature and the capacity of natural sciences, the Western mind by and large seems to have rejected epistemological rationalism in favour of utilitarianism and naturalism. Political liberalism has in general operated on an utilitarian conception of ethics, which was for a long time widely accepted as a satisfactory philosophical theory from within the perspective of empiricism. Utilitarianism denies that there are objective values in any unique sense or that there are distinctive moral reasons that move individuals. Therefore the utilitarian theory of ethics or law is inconsistent with the philosophical assumption which underlies the normative theory of authority.

The epistemological rationalism which empiricism has rejected based authority on extra-legal persons (such as God), as put forward in some natural law theories. But a normative theory of authority need not necessarily base itself in such natural law theories, nor need it appeal to the cognition of entities or percepts which are not objectively recognizable and publicly available. Neither does it need to appeal to intuition or any mystical experiences.

In the theory that I present I shall attempt to show how a normative theory of authority can be founded on an epistemological rationalism which does not require an appeal to extra-legal authority.

V

The presentation of this work follows the method of exposition and not of discovery. I pursue the inquiry in terms of the way one systematically unfolds the conceptual relationships between ideas, not the way one empirically discovers the various elements of law.

Law is a normative system created to sustain just conditions in society. Such a characterization involves at least three distinct ideas. First that law is a system, second that it s normative, and third that it is aimed at creating and sustaining just conditions. Since law is a system it must have features which are common to systems in general. Similarly, in so far as law is normative it must have properties which are essential to being normative; and last, in so far as law is aimed at creating and maintaining just conditions it must have characteristics which are necessary to achieve such ends. I shall discuss the idea of law with reference to each of these aspects.

The work is divided into four parts. Law is first of all a system. In Part I, I discuss the requirements that make law a system. There are various principles, rules, maxims and propositions in general; when these propositions etc. are organized in a certain way we get a system. But not every organization of such propositions can be said to form a system for a legal discourse. Hence it becomes necessary to define the necessary systemic requirements of law. Various theories assume that they have described law because they have identified some systemic properties. I shall argue that the systemic requirements of law are specific, hence such theories have not been able to distinguish the systemic properties of law from the properties of systems in general.

Secondly, law is a normative system. Having found out what makes law a system I proceed to discuss, in Part II, what makes law a normative system. Since not every system can be normative it becomes necessary to specify the different normative properties of law. I shall show that there are various theories which have described the properties of a normative system only, but assumed that they have identified the properties of a legal system.

When the notion of a normative system has been distinguished from the notion of systems in general, the next step will require that we further distinguish the legal system from various types of normative systems. To do this it becomes necessary to provide the criteria on the basis of which the legal system can be identified and recognized to be distinct from other normative systems. On what grounds can we separate the legal system from other normative systems? The answer to this question is the topic of Part III. It is argued here that to provide the appropriate criteria the epistemology of law must be investigated. The epistemological status of basic legal propositions is examined.

Law is finally, a juristic normative system. Once this system has been identified as the consequence of the investigations in Part III, I proceed in Part IV to the next and most important task of discussing the substantive properties of a juristic normative system, i.e. the legal system.

In terms of the contents Parts I, II and III together form the first aspect of the work. Their main task is to eliminate problematic and inappropriate views of law so that the appropriate substantive aspects of law can be described in Part IV. This last Part thus forms the second and the positive aspect of my work. Only here are some central Indian concepts involved.

At the outset it is necessary to mention some basic shortcomings from which a work of this nature is likely to suffer. The idea of law rests finally on the notion of the individual, the community and the world. These notions present difficulties which require inquiries in directions which can be dealt with only in rudimentary ways here. The issues concerning possible worlds present serious limitations to the depth of analysis. Similarly, the status and actions of the community present ontological problems, all of which cannot be pursued here. Lastly, issues about the individual's free-will bring up serious questions but I shall discuss them only in limited ways. In each case the idea of law will be the main concern.

Distinguishing the idea of a legal system from that of a political system raises various questions about the latter. These can be discussed only to the extent necessary to highlight some aspects of the idea of law. The idea of a political system or of a state requires a separate work.

Perhaps at the outset it is also necessary to say a few words about the nature of discussion that one must expect in this work.

It is difficult to say what distinctions (if any) Kelsen, Hart, Fuller and other traditional theorists have had in mind while distinguishing between jurisprudence and philosophy of law. Jurisprudence, as I understand it, is an investigation into the prudential *application* of juristic principles. That is, it seeks to understand and better the application of legal principles to the legal phenomenon as it is found in different communities and social contexts. In this sense one requires different jurisprudential investigations for different legal systems. Philosophy of law has completely different tasks. It does not probe into questions of what would constitute a prudential application of particular juristic principles for a particular legal system; rather it seeks, first of all, to define the basic legal principles which can be accepted as prudent principles applicable to every legal system. The second and equally important task of legal philosophy is to justify and explain the grounds for the basic juristic principles whose application is said to manifest prudence. Philosophy of law is thus about the basic legal principles which all jurisprudence must necessarily employ.

Since philosophy of law aims at universality and jurisprudence at the particular application of universal juristic principles, every jurisprudence must eventually draw its life from some philosophy of law. C.K. Allen's *Law in the Making* or G.W. Paton's *Jurisprudence*, for example, are standard works in English jurisprudence which have their sources in Bentham's and Austin's legal philosophies. Jurisprudential works in the Soviet Union and China on the other hand draw their lives from Marxist metaphysics of the community and the self. One can notice that Kelsen's *Pure Theory of Law* is quite unlike Allen's or Paton's texts. And this is so because *Pure Theory of Law* is essentially a work in philosophy of law, although sometimes it does indulge in some jurisprudential issues. One may, of course, argue either that the depth to which Kelsen pursues basic questions in the philosophy of law is enlightening, or that it is insufficient. The same may be said about his treatment of jurisprudential issues. However, what is important to note is the fact that the kinds of problems that Kelsen is trying to resolve are very different from those which one finds in a textbook of jurisprudence such as that by Paton.

In the sense defined, what follows is a work in philosophy of law and not in jurisprudence. I shall attempt to spell out basic legal principles and justify them. This will necessitate considering explanations about their origins. Each issue shall be pursued to its deepest roots, or at least as deep as is necessary to understand the basic aspects of the idea of law.

The idea of law that this work attempts to define is thus not the idea of a particular social phenomenon as it exists in some particular nation. Nor is it the definition of a specific idea as it exists in the jurisprudential literature of a particular legal system. It is the definition of elements which apply universally to all legal systems and on which every jurisprudence must eventually be based. Where reality does not accord with the idea of law the results of this work will appear both normative and reformative.

Although legal theorists have not cared to distinguish jurisprudence from philosophy of law, it is important to observe the distinction since the two enterprises attempt to solve different types of problems about the same subject matter. However, although distinct, the two endeavours are at the same time also intimately related. Consequently, indulging in philosophy of law without acquainting oneself with various jurisprudential contexts can only lead to vague abstractions. Conversely, pursuing jurisprudence without understanding the basic philosophy that motivates the law's existence and working can either be misguided or else blind and mechanical. One cannot set out to discover the prudential applications of juristic propositions without first understanding what propositions constitute prudence and the most fundamental reasons for their efficacy and existence. Therefore a clear understanding of the philosophy of law is essential for jurisprudence as well as for practising law in a meaningful way. This work seeks to invite the attention of all those who wish to examine law in all its depth. The more closely one is involved with the practice and study of law the more deeply, I would think, one needs to understand its philosophy.

PART I

THE FORMAL REQUIREMENTS OF LAW AS A SYSTEM

LAW AS A SYSTEM

Law is a normative system created and sustained to bring about just conditions in a society. In so far as law is a system, it must have features which are common to systems in general. A consideration of such features raises problems which are different from those which arise when law is considered as being normative or as attempting to attain just conditions in a society. This first part of the work is a discussion of only those features which make law a system. The systemic properties of law are true of it because it is a system and not because it is law. It is necessary to specify these features at the very outset because they are often confused with the normative or the juristic properties of law.

There seem to be three basic formal characteristics of law which make it a system. These are:

i) the propositions of law must be correlated to each other in such a way that the basic ones can be distinguished from the derivative ones, i.e. the propositions must be *systematizable*.

ii) the network of propositions must, in some sense, be *complete*.

iii) the correlated propositions must be *consistent*.

I SYSTEMATIZATION

Systems can be formed in different ways. Depending on the way and the purpose for which the system has been formed, the term 'system' can have different meanings. Legal propositions cohere to form a network of units which are internally correlated. Although a few propositions in the system may conflict with each other, the basic units are connected in such a way that there is an overall consistency in application. A unit is basic if it cannot be deleted without changing the properties which apply to the system as a whole, or if it uniquely determines at least one aspect of some other unit. Such basic units must be irreducible in the sense that they cannot be replaced by any simpler proposition without a loss of meaning or a change of truth value. It is in this sense of a system that legal propositions form a system.

The correlation between various basic and non-basic propositions in law is such that the norms that apply to a particular case can be deduced from the general norms of the system. In this sense the general and the particular norms of the system are deductively correlated.

The property of deductive correlation between propositions is sometimes mistaken for a characteristic of formal systems only. Rationalists have, thus, distinguished themselves from empiricists on the basis of making a distinction between formal systems and empirical systems in terms of the criterion of deduction. Deduction is a relationship between propositions, it is not dependent on the real content of propositions. A brief look at the roots of the confusion which arose due to the notion of deduction will be relevant here.

The notion that deductivity is specific to formal systems seems to have its roots in Aristotle's definition of science. Aristotle took as a general idea of science the kind of deductive or apodeictic science which is exemplified by Euclid's geometry.[1] This view was later reinforced by the Cartesian emphasis on mathematics.[2] According to the Aristotelian ideal every science must have the following necessary characteristics:

i) a set of self-evident principles, the truth of which requires no further proof;

ii) a deductive structure, i.e. if certain propositions belong to the system then any logical consequence of these must belong to it;

iii) a real content, i.e. the propositions which belong to the system must refer to a specific domain of real entities.

With the discovery of non-Euclidean geometries the first and the third conditions had to be dropped. That is, it was accepted that a deductive system need not have self-evident principles as its base.

and the domain to which it refers need not necessarily be specified.[3]

The second condition, however, has led to some confusion. Since empiricism was equated with the inductive method and rationalism with the deductive method, many non-formalists who wished to make law 'scientific', and hence into an empirical science, attacked the formalists for making law a deductive science, and hence non-empirical or non-scientific. Such a criticism is indeed misdirected, for the property of being a deductive system does not prevent any science from being an empirical science. Even the view that empirical sciences involve only inductive inferences seems to be a hasty generalization.[4] The non-formalist's attack, such as that of Stephen E. Toulmin who considers legal inferences to be the archetype of non-deductive inferences, is thus misplaced. Outside mathematics, Toulmin countenances the replacement of the old geometrical model of logical deduction by a 'procedural pattern'.[5] Chaim Perelman also seems to believe that legal logic is different from formal logic on similar grounds.[6] Even if we grant the non-formalist's claim that the formal structure of legal reasoning is different or peculiar, it does not by itself constitute an attack on analytic jurisprudence, for by itself deductive formalism in arguments neither makes a science empirical nor non-empirical. The arguments in natural sciences are deductively correlated, while many deductively correlated arbitrary systems fail to constitute a science.

The difference between various deductive systems, whether they be systems of logic, mathematics, economics or law, arises due to the way their basic propositions are selected, and not merely due to the formal structures of their arguments. The grounds on which the basic propositions of logic are selected may be arbitrary ones; basic mathematical propositions are selected on the grounds of their explanatory power, which within the system means the possibility of generating all or the maximum number of theorems of the system. Similarly the basic propositons of law are selected in a way that is in accordance with the desired ends of the enterprise. In fact all deductively correlated systems of propositions are distinguished from each other in virtue of the ends for which their basic propositions are selected.

If the formal notion of deduction is not opposed to empiricism, the reason for the formalism that analytic jurists wish to retain in their science must lie elsewhere.

Analytic jurisprudence too, it must be remembered, wishes to make its enterprise 'scientific'. The preoccupation of analytic jurisprudence does not seem to be with the second Aristotelian requirement concerning science, as the non-formalists seem to assume, but with the first one. The emphasis of Bentham's and Mill's utilitarianism and Austin's positivism has been on abandonment of the postulate of self-evidence. The self-evident basic principles which they rejected were some principles of natural law. They replaced them with the norm which states that law is what the legislators say it is. This proposition is not self evident. The abandonment of self-evident propositions apparently makes the legal science fit the non-Aristotelian, non-Cartesian model of science. The jurists thereby preoccupy themselves only with deducing the consequences of the basic norms and do not worry whether they are true.

Thus, whereas analytic jurists have attempted to retain the 'scientific' character of legal science by asserting the acceptance of basic legal propositions not as self-evident truths but merely on the grounds that people (including such jurists themselves) have accepted them, the non-formalists have attacked these jurists in ways which do not even challenge such claims to being scientific! They criticize them on grounds of formalism, but formalism, as noted, does not by itself stop a science from being empirical or socially relevant. The central criticism of analytic jurisprudence, if it is to be a substantive one, has to be directed against the analytic jurist's interpretation of Aristotle's first requirement for a science.

Legal realism or empiricism thus fails to constitute a reaction against legal positivism. The central thrust of sociological jurisprudence such as that of L. Duguit, or of realism such as that of O.W. Holmes and Roscoe Pound, concerns revision in law and its ability to adjust itself to ever changing social problems. These aims are significant, but they can be argued independently: they do not contradict the analytic jurist's desire to systematize legal propositions deductively. The central intention of this work too is to systematize legal propositions in such a way that they are deductively correlated, i.e. in a way such that the secondary propositions of law can be deduced from the basic propositions. However, as will be evident, its substantive contentions are very different from those of analytic jurisprudence.

The basic propositions of law from which other propositions can be deduced are those which, for example, tell us what may and what may not be legislated, who may and who may not populate the legal system, what sorts of propositions can belong to the legal system, and also why there is a legal system at all. Such basic propositions express the ontology, the teleology and other fundamental aspects of law. I shall examine all such basic propositions systematically through the course of this work.

To argue that a systematization of legal propositions, in the manner suggested above, is possible, is to contend that foundationalism is true for law. However, to argue abstractly for the truth of foundationalism does not seem to be a fruitful task, for if foundationalism is true the best way to prove it is to actually show that the foundations exist. Hence, I will limit myself here to mentioning a basic reason why I think foundationalism is true for law, and leave the rest to be proved through the course of this work as I attempt to exhibit the foundations.

The possibility of systematizing a deductive system with any arbitrary set of basic propositions obtains only when one is constructing an artificial and uninterpreted system. Such systems are 'artificial' precisely in the sense that they cannot be interpreted to apply to the possible world inhabited by human beings. Any deductive system that can be applied to the actual world is restricted by the characteristics of that world. Thus a number system that is to be used in the actual world must be axiomatized in ways which allow for such use. Similarly a physical geometry which applies to the Euclidean and Newtonian space-time must be axiomatized in a specific way.[7] Now when it comes to law, which too is an application of a deductively correlated set of propositions to the actual world, to assume that it can be systematized in any arbitrary way or that any type of basic proposition can be its *grundnorm* or rules of recognition is not only groundless but also misleading. For it suggests that legal systems are like abstract uninterpreted formal systems which can be axiomatized in arbitrary ways and be artificial systems like the various artificial languages. Law is not an artificial system, hence the basic sub-set of axioms which yields and regulates other legal propositions must be specific.

II. i COMPLETENESS

The notion of completeness is often assumed to be a purely formal notion concerning the relationship between propositions. But this is not the case when we come to consider legal propositions. It is desirable that law be complete for the basic reason that it must apply to all cases, but the desire to apply it to all cases is itself grounded in the reason that we want to protect everyone from injustice. Law is thus intended to be complete in the sense that all socially relevant circumstances are correlated to at least some legal norms so that these norms may be applied to these circumstances to protect individuals and groups from being treated unjustly. Such a sense of completeness is, clearly, not merely a formal sense. Law is also intended to be *morally* complete. Various thinkers have nonetheless discussed the question of legal completeness in terms of 'closure rules' and 'sealing legal principles', as if such rules and principles were a matter of mere formal consideration.

The desire for formal completeness seems to be grounded in the possibility of obtaining a system which contains all its logical consequences. This rational requirement for ideal completeness applies to all deductively correlated systems of propositions, whether they be physics, biology, or law. The ground for such a requirement is best expressed in the Leibnizian principle of sufficient reason: the notion that there must be a sufficient reason for all that happens and that it should always be possible to show the actuality of that event as a foreseeable possibility.

The epistemological requirement of our reason is one thing, the ontological structure of the world another. From the legitimacy of the requirement for completeness one cannot jump to the conclusion that any legal system is complete. Since law applies to deeds and entities, to suppose that there are norms for every deed and entity is to assume that no novel types of deeds or entities can come into being. Such a metaphysical assumption about social reality seems unwarranted. Groups and entities organize themselves in various new ways, giving rise to novel entities and deeds. The view that society is open and creative seems to me to assert the truth about social reality. Since new entities and deeds, which have not been classified in legal discourse, often come into being and since we are morally required to protect everyone by applying law to all cases, lacunae in the system of norms are inevitable.

Since the epistemological requirement for law to apply to all cases is grounded in the moral requirement to do justice in every case, any formalization of closure rules or sealing legal principles which does not take the moral requirement into account cannot describe legal completeness. Yet various theoreticians who propose deontic logics and some, such as Ilmar Tammelo, who specifically propose the logic of law, formalize various propositions as closure rules for law as if the choice between these different propositions is morally neutral. In selecting certain propositions as *the* closure rules for law, in the final analysis such deontic logicians are only expressing their moral views, albeit in a formalized language. Such views need to be morally justified. That is, if these formal principles are to be accepted as closure rules for law, it needs to be shown how on the basis of such principles one can protect everyone from injustice.

Questions about the formalization of legal discourse raise straightforward issues about completeness. A subtle and more complex way in which the issue of completeness arises in legal theory is through questions concerning the sources of law.

It is generally accepted by legal positivists that all laws have a social source. That is, the content and the existence of law can be determined by reference to social facts without relying on moral considerations. Ronald Dworkin attempts to show that legal positivism is an inconsistent theory because it cannot tell us what the law is on matters not referred to in any source.[8] For example if a person has a legal right only if it can be traced back to a social source, is it the law that he does not have the right if no source confers it on him? The essential points of Dworkin's arguments can be presented as follows:

If p is a legal proposition and S(p) the source for p, legal positivism asserts that p has a social source, that is:

1. $p \longleftrightarrow S(p)$.

By counterposition of 1., we get:

2. $\neg p \longleftrightarrow \neg S(p)$.

By substitution in 1., we get:

3. $\neg p \longleftrightarrow S(\neg p)$.

From 2., and 3., we get:

4. $\neg S(p) \longleftrightarrow S(\neg p)$.

That is, if there is no social source for a legal proposition then there is a social source for its negation. Such a conclusion, according to Dworkin, is not empirically true, for in actual practice we do not find that wherever there is no affirmative rule for an action there is a one prohibiting it. Dworkin argues that whether or not there is a social source for a proposition, every hard case must necessarily be decided by the judge, hence in every case there has to be a right answer. For our purposes, at this stage, it is not necessary to question Dworkin's 'right answer' thesis. Only the point that the right answer completes the system of norms needs to be noted. In so far as the notion of completeness is concerned, what is entailed by Dworkin's conclusion that legal positivism is false since it does not explain the status of laws for which there is no social source? The negation of a legal proposition prohibits, or at least disallows, the deeds that the affirmative proposition makes possible. Hence the above conclusion, that legal positivism entails that if there is no social source for a legal proposition then there is a source for its negation, is equivalent to saying that legal positivism entails the closure rule: whatever is not explicitly permitted is prohibited. What Dworkin's analysis shows (although he does not characterize it in these terms) is that if legal positivism is true it must assume conceptually fallacious closure rules, such as that if there is no social source for a legal rule then there is a source for its negation, or its counterpart: whatever is not permitted is prohibited.

The proposition 'whatever is not permitted is prohibited' and its opposite 'whatever is not prohibited is permitted', are often put forward as closure rules for law.[9] Such propositions can claim to be closure rules only if the asserted relationship between the deontic operators actually obtains in law. But, as Dworkin's arguments show, the assumption that such closure rules actually apply to law can only lead to fallacious conclusions. Such closure rules seem to arise from some mistaken assumptions about the conditions for permission and prohibition in law.

In law the truth conditions for permission are very different from the truth conditions for prohibition. The two cannot be equated. That people are free to act as they wish is something conceptually presupposed by law. The granting of freedom, i.e. permission to do something, can only arise in very special circumstances in law. There seem to be two types of such special conditions. The first arises when there has been a verdict to the effect that someone's freedom is to be curbed in some way, such as when a criminal is put in jail. Permission is required in such cases to allow any freedom to the convicted person. The second arises when special circumstances require acting in contradiction to a generally established law, such as when one needs to look into someone's personal belongings in the way the police needs legal permission (warrant) to search someone's house. Similarly, prohibition by law can also occur, but only in very special circumstances. Prohibition is usually required when the public has to be prevented from incurring some personal harm, such as when one needs to prevent people from driving over a weak bridge or swimming in dangerous waters.

Observations of actual legislations which permit or prohibit can show the totally different conditions under which they have been legislated. To understand why a particular action is permitted or prohibited one must look into the actual context of the law. The frequent arbitrary formal claims in deontic logic that 'whatever is not prohibited is permitted' and vice versa, are, thus, normative claims whose truth seems to depend only on some questionable moral assumptions. The historical roots of such general logico-moral claims seem to lie in the mistaken assumption that the general freedom to act stands in need of a permission by law, or that one lives and works in the jurisdiction by the grace and kindness of the sovereign. If the people have a fundamental right to freedom then whether the sovereignty be vested in the crown or in parliament the sovereign does not grant freedom; people already have a right to it and the law recognizes this. The belief that whatever is not prohibited is permitted seems to be the residue of a feudal mentality where the monarch owned everything and gave permission to people to live and work and be free. Such closure rules in law would perhaps be what Nietzsche called an expression of 'slave morality'.

The basic principles of deontic logics are, thus, not morally neutral. By expressing them in formal language as Tammelo, Von Wright and others do, one does not get away from expressing morally questionable principles. Law is formally incomplete. The reason for its incompleteness lies in the nature of social reality. Since the social realm is an open system, keeping law open is not only a formal but also a moral necessity.

Although understanding the reasons for the formal completeness of law requires that we also understand the grounds for its moral completeness, the existence of *incompleteness* in legal discourse can, nonetheless be discovered in actual practice when one finds that justice cannot be done by an application of existing laws. On the basis of the foregoing discussion the conditions for incompleteness in legal discourse can be specified. Such a specification, however, requires a more detailed account of legal discourse than presented so far. Therefore in what follows I will briefly discuss the grammar of legal discourse so as to distinguish different types of legal propositions. The conditions for incompleteness will be subsequently specified in terms of the distinctions made in this discussion.

In itself the specification of the conditions for incompleteness would require only a few grammatical distinctions. However, I intend to make use of this occasion to discuss the grammar of legal discourse in such a way that it serves the purpose of my whole work. This will make the discussion more detailed than required for the specific point, but it will facilitate all subsequent discussions by providing the necessary meta-language in which one can talk about legal discourse. It must be emphasized, however, that from the point of view of a grammar the following remarks are rudimentary and intended only to serve the purpose of this work.

A discussion of grammar is also necessary in another way. Since I make a distinction between basic and derivative legal propositions and intend to explicate the basic ones later, a discussion of the types of legal propositions will give this distinction a definite content.

II. ii THE GRAMMAR OF LEGAL DISCOURSE

Grammatically the elements of a legal proposition can be distinguished as the legal-subject, the legal-object and the legal-nexus. The legal-subject is any entity whose behaviour is guided by the legal proposition; for example entities such as 'every citizen', and 'every partner'. The legal-object is any instance of the action regulated by the legal proposition, for example 'driving on public roads', 'becoming a partner in business', etc. The legal-nexus links the legal-subject with the legal-object. Legal-nexuses are injunctions like 'shall drive on the right' or 'may carry out the assignment', etc. The part of the proposition concerning the legal subject, object or nexus is a clause or a phrase within the complex sentence.

Besides the regular logical connectors ('and', 'if', 'or', etc.) and the deontic operators ('may', 'must', 'can', 'shall', etc.) the vocabulary of the legal discourse consists of observational terms and theoretical terms. Theoretical terms are given their meaning by the way they are defined within the system. Observational terms get their meaning from ordinary language. Theoretical terms functioning as legal subjects determine one aspect of legal ontology, the ontology of the entities that populate the legal system. Typical entities in this ontology are citizens, corporations, trusts, etc. Theoretical terms functioning as legal-objects determine the ontology of actions, i.e. actions found in the legal realm and actions not to be found there. Typical actions in this ontology are contracts, marriage, theft, larceny, murder, rape, etc.

Legal propositions are generated by starting with the simplest notion of the legal-subject and the simplest notion of the legal-object. These are united by means of the simplest legal-nexus, in which the deontic operator occurs. It must be emphasized that the simplicity of these notions is only relative to the systems. The notions occurring in primary propositions are simple because they are not operationally defined in the system, i.e. they are not theoretical terms; they are observational terms whose meaning is taken to be known in a general way. Starting from such a primary proposition, the legal-subject, the legal-object and the legal-nexus of a primary legal proposition are further elaborated with the help of a set of rules so that in its complexity the legal proposition now applies to all known cases on the one hand, and as specifically as possible to each case on the other. The rules on the basis of which primary legal propositions are further elaborated belong to the second order of legal discourse. Complex legal propositions belong to the first order.

These points are illustrated by the following example. A legal proposition may begin with a primary proposition such as: 'A person commits homicide when he causes the death of a human being'. In this the legal-subject 'person' is defined as 'a human being'; the notion of 'a human being' is basic or simple, its meaning is taken to be understood in a general way. The legal-object 'homicide' is defined as 'causing death of a human being'. The notion of 'causing death' is a basic or simple notion; it too is taken to be comprehended in a general way. The notion of committing an act forms the simple legal-nexus which relates the subject to the object. This is the first or starting primary proposition, a development of which can result in a complex legal proposition of criminal law. The development consists of a series of qualifications and definitions of the subject, the object and the nexus by means of second order rules, namely the rules of classification, individuation and correlation. The rules of classification classify legal subjects and objects in ways such that their scope of application is comprehensive and their meaning as specific as required. The rules of individuation individuate the theoretical terms in such a way that the proposition becomes a rule in a particular division of law. The rules of correlation finally correlate the individuated proposition with certain other states of affairs which must obtain when the conditions stated by the individuated proposition obtain.

The grammar of generating legal propositions can be expressed very briefly by symbolizing the essential steps.

If $\emptyset$ is the existential quantifier, (LS) the legal-subject, and the legal-object is expressed as (A.C), i.e. the action A done under condition C, then the first order primary legal proposition can be expressed as:

1. $(\emptyset)(LS)(A.C)$.

(That is, one/some/all legal-subject(s) is/are said to have done A in case C).

This is followed by the application of the second order rules of classification on (LS) and (A.C) in step 1, which yields:

2. $(\emptyset)(LS)(A.C) = T$.

T is any theoretical term, such as 'homicide', 'marriage', 'purchase', etc.

This is followed by the application of the rules of individuation on T in step 2, which yields:

3. $(\emptyset)(LS)(A.C) = T = X$.

X is a general class of action which belongs to a certain division of law, such as to civil law, criminal law, constitutional law or to tort law, and more generally to private or public law. X may hence be a 'contract', and 'offence', a 'treason' or a 'damage', amongst other legal-objects, respectively, depending on the division of law. The grounds for the rules of individuation on account of which legal-objects are individuated differently will be discussed later.

In the final stage the rules of correlation are applied to X in 3., so that X is related to another set of resulting conditions, let us say R, which is to be brought into existence when X obtains. This completes the legal-nexus and yields:

4. $(((\emptyset)(LS)(A.C) = T) = X) = R$.

R could be a set of duties and rights for the legal-subject(s) when X in 3. is a contract. But if X is an offence or a damage then R could constitute a fine or punishment.

In criminal law (A.C) describes an action that is done under certain conditions, but in other branches of law (A.C) may describe not something that is done, but something that *needs* to be done if T in 2. is to arise. In such cases (A.C) will in fact be performative rules, i.e. rules which describe performances on the doing of which the intended condition T can be taken to exist. For example in law of citizenship (A.C) may describe the performances that need to be executed, such as oaths, if a human being is to become a citizen. In civil law, similarly, the performative rules may specify the conditions on the performance of which a marriage may be said to have taken place.[10]

This is a very simple sketch for a grammar that generates first order legal discourse. Its details should, however, suffice for the subsequent related discussions about law. It must be emphasized that this scheme represents only a conceptual order of the way in which the first order legal discourse is generated. In actual practice all these steps are present but they need not be in the order outlined here. The codification of law does not necessarily follow the conceptual order, it develops historically, involving many pragmatic considerations. The following examples should make the point clear. The first is from the Canadian Criminal Code[11] and the second from the Model Penal Code of the Americal Law Institute.[12]

PART VI-SECTION 205

Homicide

HOMICIDE—Kinds of homicide—Non culpable homicide—Culpable homicide—Idem—Exception.

205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being....

In the code here, proposition 205 is the primary proposition. This is step one. In the next step the rules of classification begin to classify homicide and the related conditions; this begins in proposition 205.(2) above and leads to:

> *Murder, Manslaughter and Infanticide*
>
> MURDER.
>
> 212. Culpable homicide is murder.
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
>
> (b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or....
>
> CLASSIFICATION OF MURDER—Planned and deliberate murder—Contracted murder—Murder of peace officer, etc.—Hijacking, kidnapping or sexual offence—First degree murder—Second degree murder.
>
> 214. (1) Murder is first degree murder or second degree murder.
>
> (2) Murder is first degree murder when it is planned and deliberate....

In step three the classified deed is individuated, whereby it becomes a deed concerning a particular branch of law, criminal law in the above case. The individuation in this case is as follows:

> MURDER IN COMMISSION OF OFFENCES.
>
> 213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or section 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being....

It would be noticed that unlike the Code I have placed Section 213 after 214. This is to point out that conceptually individuation (in 213) must come after classification (in 214). The Code, evidently, is not conceptually ordered. It has its own history of evolution. In the fourth stage the classified, individuated proposition is correlated to other states of affairs:

PUNISHMENT FOR MURDER—Minimum punishment.

218. (1) Every one who commits first degree murder or second degree murder is guilty of an indiclabe offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment: 1973-74, c. 38, s. 5; 1974-75. 76, c. 105, s. 5....

The official draft of the Model Penal Code shows that similar conceptual steps are involved in creating legal propositions even if one approaches the issue from a different empirical perspective.

Section 210.1 is the primary first-order proposition of this code, and it is similar to Section 205(1) of the Canadian Criminal Code. In this Model Code the authors have chosen to carry out the classification of theoretical terms first. These definitions are intended to complement the subsequent classification of the observational terms.

Section 210.0. Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical conditions;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

The primary proposition:

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

Classification:

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

> (a) it is committed purposely or knowingly; or
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

Individuation:

> (2) Murder is felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6]....

Correlation:

> Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.
>
> (1) *Death Sentence Excluded*. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
>
> (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
>
> (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
>
> (d) the defendant was under 18 years of age at the time of the commission of the crime; or
>
> (e) the defendant's physical or mental condition calls for leniency; or
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt....

The rules of classification, individuation and correlation are of course not the only second order rules that apply to the first order propositions. There are other second order rules which apply differently to the first order propositions, such as the rules of interpretation and the rules of amendment. I shall discuss these second order rules in detail subsequently. The functional difference between the first and higher order rules, it must be recalled, is that whereas the first order legal rules apply to the activities of everyone, the second and higher order rules apply to the activities of those who legislate the first order rules. Various thinkers, such as J.C. Smith, Ilmar Tammelo and others, have discussed the different second order legal rules, such as the rules of classification and correlation. But these discussions do not make clear how these second order legal rules are organized amongst themselves, and moreover what the basis is for having these particular second order legal rules.[13]

The second order legal propositions or rules, such as the rules of classification, individuation, correlation, interpretation and amendment, are not just arbitrarily there, they are there on very specific grounds. Not just any arbitrary rule can become a rule of classification, interpretation, amendment, etc. Smith, Tammelo and others have merely listed the second order rules. It needs to be shown which particular second order rule can become a rule of classification, correlation, etc. The choice of the second order rules is itself very strictly governed by the third order legal propositions. These third order legal propositions determine what are to be the second order rules of classification, individuation, correlation, amendment, interpretation, etc. Since the third order legal propositions determine the second order legal propositions and the second order determine the first order, the third order propositions also determine the first order propositions, albeit indirectly. The third order legal propositions thus form the most basic legal propositions. These basic propositions will be presented and discussed in Part IV. Here, on the basis of the foregoing discussion of the grammar of legal discourse, it is important to draw attention to two significant issues. These will be developed as we go along.

First, since each order of legal propositions determines the propositions the order below it, and since legal theory characterizes the second and third order legal propositions, the relationship between legal theory and legal practice (i.e. the application of the first order propositions) is internal and necessary.

The second significant point to note is that in the first order legal propositions of different codes terms such as 'ought', 'must', 'prohibits', just do not occur. It is partly to make this point evident that I have quoted the actual codes in detail. The fact that these terms do not occur in the criminal codes is not to be passed over lightly. In fact, as we shall subsequently see, a significant insight into the nature of law can indeed be obtained if one can unravel why terms such as 'ought' and 'must' never occur in the first order legal propositiions. Hans Kelsen in his *Pure theory of Law* often repeats that a legal norm is an 'ought' statement. Various other theorists have also often said or assumed this. This is certainly puzzling, for no first order legal proposition ever says 'you ought to do this', or 'this ought to be done', the term 'ought' just does not occur. Most theorists have also stated or generally assumed that propositions, of criminal law for example, prohibit some actions. Here again there is a disparity between facts and theories. No criminal code ever says that 'murder is prohibited', or even 'do not do X, which is an offence or a crime'; the propositions of legal codes just do not have such grammatical structures; they do not prohibit anything. All legislated legal propositions are straightforward descriptive propositions. They describe what the case is in a certain state of affairs and what will be the case as a consequence. A legal theory must analyse and explain the legal propositions as they are actually found, i.e. as descriptive propositions, and not build up artificial descriptions of them as 'ought' norms, and so on. The significance of this point will be systematically explicated as we go along.

Having outlined the essential meta-language in which the legal discourse can be discussed, I shall now proceeed to specify the conditions under which a legal system is incomplete.

II. iii INCOMPLETENESS

A system of norms is said to have gaps at the points at which it is incomplete. Legal gaps will occur if there is a breakdown in the system at any of the four stages of generating legal propositions mentioned earlier. That is, there will be gaps if:

a) a subject whose actions are to be brought under the consideration of law, or an action to which the law is to apply, does not as yet populate the legal ontology, i.e. there is no primary legal proposition relating the legal-subject and the legal-object.

b) the rules of classification are unable to bring the legal-object under a general action-type, i.e. classification is unable to yield a theoretical term applicable to the case.

c) the theoretical terms generated by the application of the rules of classification cannot be individuated; for example when it is not clear whether the case under consideration is one of criminal offence, tort or political treason.

d) the individuated proposition is not correlated to some resultant states of affairs: i.e. there is no punishment fine, rights, duties or priviliges correlated to it.

III CONSISTENCY

In discussing the eight ways in which one can fail to make law, Fuller mentions non-contradictoriness of norms as an essential requirement of legal systems (his fifth condition).[14] The consistency of a system is a systemic requirement of all deductive systems, it does not apply to law uniquely. This requirement, hence, does not tell us something specific about law. However, since legal discourse is a sytem of deductively correlated propositions, it becomes important to know the sense in which this system needs to be consistent.

Since legal discourse is a system of deductively correlated propositions its basic and derivative propositions must be consistent with each other so that there is an overall consistency in the system. In such a system both p and not-p would not be true for any q, otherwise one would derive any q from it. Legal propositions are characteristically applied in the settlement of disputes so that every sub-set of the basic propositions must consist only of propositions which can be applied together. Evidently this requires more than formal consistency. It involves the notion that such an application be possible in a way that the joint use of the members of the sub-set does not frustrate the intentions of any of the component units. If this conditions were to be violated for some members, those members can be rejected or replaced under certain conditions. In such a case these members were, evidently, wrongly accepted as members. The real members of the system are some related propositions, specified in part by the conditions for rejection of the incompatible members and partly by the end that is intended to be achieved by the introduction of the new members. The possibility of removing the inconsistencies in this way requires a knowledge of the systematic juristic aims. A mere knowledge of the ways incompatibilities formally arise is not enough for being able to replace the inconsistent propositions by consistent ones.

Although the possibility of making law a consistent system requires a knowledge of its systematic ends, certain inconsistencies can be discovered in actual practice when one finds that the application of the existing laws allows for actions which defeat the purpose of law, i.e. the purpose of bringing about justice. The conditions under which particular inconsistencies arise in legal discourse can be specified as follows:

i) if the first order primary proposition describes a case in two different ways.
ii) if the second order rules of classification are applied in different ways to yield different theoretical terms for very similar cases.
iii) if the rules of individuation are applied to yield incompatible individuations of the theoretical terms.
iv) if the rules of correlation correlate the individuated cases with different consequences.
v) if there is a difference of opinion about what constitutes the second order legal propositions.

The last condition is evidently the most difficult to resolve. It leads to what are now rightly called, 'hard cases'. In hard cases the problem may concern the rules of classification: whether, for example, to classify a particular case as one of mercy killing or one of murder. Or it may concern the rules of individuation; whether, for example, to make a case one of treason or one of civil disobedience. Finally the problem may concern the rules of correlation, for example whether or not one must punish a case of attempted suicide.

It will be noticed that the conditions for inconsistencies in legal discourse are closely related to the conditions for incompleteness. This is natural because inconsistencies lead to incompleteness. Inconsistent propositions have to be deleted, which leaves gaps in the system of norms and creates the conditions for incompleteness. What is important to note, however, is that each type of inconsistency must be dealt with in a different manner. There cannot be one general formula of deontic relations which expresses the conditions for all inconsistencies.

Once we understand that law has not only to be formally consistent but also consistent in application and that the latter requires a knowledge of the basic moral ends of law, it becomes possible to note the errors of some theories which attempt to characterize legal consistency in purely formal terms.

The consistency of a system which contains first order declarative propositions is decided by assigning truth values to the propositions and then looking for identity in their truth functions. The success of such a method in logic has led some thinkers to believe that any system is formalizable in an ordinary extensional logic of a suitable order. Ulrich Klug, for example, has attempted to apply a first order calculus and theory of classes to legal arguments translated into the formulae of symbolic logic. [15] As we have seen, the grammar of legal propositions makes it evident that they are complex normative propositions whose modalities are unlike those of ordinary declarative propositions. Consequently first order calculi are unable to reflect the complexity of legal discourse. The failure of such first order calculi has recently led many theorists to look in other directions.

J.L. Austin's and Wittgenstein's emphasis on the non-declarative aspects of human language seems to have led various thinkers to study the deontic relations that obtain between the propositions in these aspects. The deontic logics of Von Wright, Alf Ross, Anderson and others[16] have not only been related to modal logic in general, but some thinkers, such as Stig Kanger, even assert that deontic logic can provide a solid foundation for ethics.[18] Tammelo and Ingmar Porn, on the other hand, have attempted to apply deontic logic to law.[19] If, as I have shown, the basic principles of deontic logics are themselves normative propositions and if the notions of legal completeness and consistency have not only formal but also moral connotations, then all such attempts to capture the notion of legal consistency and completeness in purely formal terms are eventually based on some deep misunderstandings not only about law but also deontic logic.

I am not opposed to deontic logics. However, it is one thing to construct abstract moral systems in logical terms and another to believe that they apply to the legal system. Even a simple basic axiom of modal and deontic logic such as 'whatever is necessary is possible' cannot be assumed to be true when applied to law. For it is quite possible that the achievement of many ends which are legally or morally necessary is not possible given a certain social structure or situation. Some may even argue that the achievement of certain legal ends is never possible given human nature.

Having noted what is true of law as a system and having also noted that these systemic requirements are grounded in the moral purposes of law, I will now proceed to examine what is true of law as a normative system. Not just any normative system can be a juristic system, hence before we can distinguish the juristic aspects of a legal system it will be necessary to understand the nature of normative systems in general, and as this relates to law.

REVIEW AND CONCLUSIONS I

THE SYSTEMIC REQUIREMENTS OF LEGAL PROPOSITIONS

1) The foundational propositions of law must be of the kind which make the ends of law possible. Not any arbitrary proposition can be asserted to be a basic proposition of law, just as not any arbitrary set of axioms can be asserted to be the basic propositions of arithmetic.

2) Law attempts to be complete not only in a formal way but also in a moral way, hence not just any deontic (or other) formal system can be assumed to be formalizing legal propositions. The logics formalize and assert the moral views of the authors.

3) Law attempts to be consistent not only formally but also in application. Moral consistency which is involved in application requires that the formal consistency of legal propositions must be in accordance with the requirements.

4) The concept of 'logic', in so far as it denotes a study of only the *formal* relationships between propositions, is inadequate for the study of law since the latter necessarily involves *moral* relationships. To characterize the ethico-formal relationships between legal propositions, a different type of concept is required. Such a comprehensive notion is available in the Indian concept of *nyaya*. There is, hence, a closer affinity between *nyaya* (including *navya-nyaya*) and law than between logic and law.

The assertion that the Aristotelian sense of 'logic' as well as the sense given to it by modern formal and deontic logicians is inadequate to serve the purposes of law requires a deeper justification than I have been able to present here. The aim of the foregoing arguments has been only to show the reasons for this inadequacy rather than to explore the meaning of 'logic' itself. This latter task would require a separate work. However, a few explanatory remarks would not be out of place.

Unlike the Aristotelian and the modern formal senses of logic, the Kantian and Hegelian senses are a step closer to the requirements of law, for they at least recognize the epistemic character of the formal logical categories of reason. But they too will not serve the purpose because they are unable to bridge the gap between the formal categories that apply to the physical realm and those which apply to the social realm. (In Kantian terms, between the phenomenal realm of causality and the noumenal realm of freedom or morality.) As we have seen, basic formal concepts such as completeness and consistency, have moral aspects to them when applied through law to the social realm.

Hegel indentifies the rational with the real, and consequently makes a formal aspect of the rational, namely contradiction, a feature of the real itself. Although the concept of contradiction is helpful in explaining some aspects of the legal *reality* (for example its dynamicity through resolution of contradictions), it does not cover the whole of the formal aspects of the *rationality* involved in law. Even if the real and the rational are the same the questions about the formal structure of the rational arguments and judgements in law still remain. The notion of completeness and consistency in law postulates knowledge of legal ends. This is not generated by the notion of contradiction alone. In fact the very estimation of what will contradict what already presupposes an independent intelligibility of legal ends. The morality of law, partly embodied in the principles that specify legal ends and with which other legal principles have to be consistent, has its sources in principles other than that of contradiction. By itself this principle is unable to provide an appropriate schema for the formalization of law, although no doubt it is basic for such a task. An appropriate schema must be able to relate the principles of justice with the principles of logic.

The Indian concept of *nyaya* is translated as both 'logic' and 'justice', and rightly so since it does mean both in Sanskrit and its derivative languages. However, many Indian and Western thinkers see this as an anomaly or dismiss it as inconsequential, without attempting to understand how the same term came to be used for two radically different purposes. This 'radical difference', however, only obtains if one accepts the Aristotelian or the modern formal sense of 'logic'. Being deeply entrenched in these perceptions of formalism, contemporary Indian and other thinkers do not seem to have cared to explore the meaning of *nyaya*. They seem to be satisfied with the mere parallels in Indian 'logic' and Western logic, ignoring all moral, legal and metaphysical differences in the perception.

Since the concept of *nyaya* relates the formal categories that apply to the physical realm (of causality) and the social realm (of freedom and morality), it in fact provides a perception of formal relations which is an alternative not only to the ones assumed or proposed by Aristotelian logic and formal logic but also dialectical logic.

As to what exactly the concept of *nyaya* is and what metaphysics it assumes at a deeper level, this is a task that needs to be undertaken by philosophers. Except for these mere suggestions, such a task cannot be undertaken here since the aim of this work is to explicate the concept of law in its totality and not merely the nature of the formal relations that obtain between legal concepts and propositions. For the purposes of this work it suffices if we note the moral character of the formal legal concepts and propositions so that the error in the manner in which deontic and other logicians have been treating them is perceived. By introducing the Indian conception of *nyaya* in this discussion I do not mean to assert that this is the only right perception, but only to point to a viable alternative which needs to be explored. For all it matters, one may choose another term instead of *nyaya* to cognize the formal working of law. The point is to be aware of the fact that, in a major way, the modern difficulties in the logic of law arise not merely because of the problems in law and legal language but mainly because of the very conception of 'logic'.

PART II

THE NORMATIVE REQUIREMENTS OF A SYSTEM

I LAW AS A NORMATIVE SYSTEM

A legal system is a normative system but not all normative systems are legal systems. The notion of a normative system is thus a basic and more general notion. Games, sporting events, clubs, universities, trade unions, the police and the army are other different types of normative systems. The idea of a legal system is thus not the idea of a normative system: the two need to be distinguished. However, since the legal system is one type of normative system, attributes applicable to normative systems in general will also apply to legal systems. Legal discourse will, therefore, exhibit all the necessary aspects of normative systems. Consequently if one identifies the necessary conditions of normative systems in legal discourse it does not follow that one has identified the legal system. Much more needs to be said to separate the notion of a legal system from the notion of normative systems.

Elementary as the above points may be, many legal theorists including Hart, Kelsen and Fuller seem, in some very basic ways, to have made the mistake of assuming that they have said something specific about law when what they have said is true of normative systems in general. In fact a central shortcoming of many recent legal theories seems to be their inability to distinguish the properties of legal systems from those of normative systems. Even theorists such as Alchourn and Bulygin who have approached the notion of a legal system specifically through an analysis of the notion of a normative system seem to make no distinctions between qualitatively different types of normative systems. They too seem to assume that they are speaking specifically about the notion of law when this hardly seems to be the case.[1]

In this second part of the work I intend to discuss the characteristics which belong to law as normative system so that one may not confuse these characteristics with the idea of a juristic system. The discussion will also attempt to show how some significant assertions made by Hart, Kelsen and Fuller, which they took to be assertions about law, are in fact assertions about normative systems in general.

To discuss the normative requirements of law it is necessary first of all to distinguish between norms and non-norms. That is, it is necessary to be clear about the notion of a norm. I shall make only the relevant preliminary distinctions here. They will be elaborated subsequently in Part III, while discussing the epistemological status of norms.

II NORMATIVE DISCOURSE AND FACTUAL DISCOURSE

What makes a norm different from other types of propositions? Linguists have often made a distinction between normative discourse and descriptive discourse. Such a distinction makes unwarranted philosophical assumptions. The fact that a proposition is normative does not exclude it from being descriptive. Propositions such as 'a cricket pitch is twenty-two yards long', or 'in democracy the government is representative', are both descriptive and normative. They describe the game of cricket or the practice of democracy for those who wish to learn about them, but they are normative for those who wish to participate in them. The characterization of a proposition depends upon the perspective from which it is perceived. Its normativity cannot be decided by merely looking at its grammatical form.

Some thinkers seem to believe that if the grammatical form does not reveal the normative character of a proposition, its logical form must, especially if a deontic operator ('ought', 'must', 'may', 'permitted', 'prohibited', etc.) is present in the proposition. Such a belief again seems to be held without justification. Although it is possible that a deontic operator may occur in a norm this is not necessary. In the examples mentioned earlier the sentences do not have deontic operators. They can nonetheless be taken as normative. Propositions of criminal law too, as we saw in Part I. are purely descriptive propositions; still, they can certainly be taken as normative.

Whether or not a proposition is normative can be decided only by considering the purpose for which it has been proposed and the context in which it functions. Propositions are norms only with regard to a person's actions and in relation to his situation. For a person participating in a system a proposition may be normative; the same proposition could be descriptive for another person who does not belong to the system. This evidently suggests a referential and contextual theory of norms. As against the structuralists, I take a functionalist theory of norms to be asserting the truth. A functionalist theory of the type suggested above, which in Carnap's terms adopts a material mode of speech instead of a formal one,[2] is indeed faced with many difficulties. But these difficulties seem to me to be far weaker than what any other theory would face. I shall attempt to justify my contentions and discuss the difficulties in Part III where I discuss the nature of legal propositions and the semantics involved in it. Here it will be important to sharpen the distinctions between norms and non-norms.

In accordance with the mentioned characteristics of norms, a norm can be defined as any proposition whose purpose is to guide the actions of conscious beings so as to create the possibility of mutually intelligible behaviour amongst the participants, whether there be two participants or many. When conscious beings do act in accordance with the norms the possibility is actualized. Such an acutalized possibility I wish to call a *feat*, in the original sense of the word, in which it means any deed, not a special one.[3]

Feats are to be contrasted with *facts*. I intend to use the term fact in the ordinary sense in current use. In this sense the use of the term in restricted to refer to cases whose existence is not dependent upon the activities of human beings.[4] Normative propositions then concern feats, and factual propositions concern facts. The contrast is, hence, strictly between normative discourse and factual discourse, and not between normative discourse and descriptive or prescriptive discourse.

A set of deductively correlated propositions can be a normative system only if its purpose is to describe human conduct in such a way that it creates possibilities for various mutually related feats. Feats belong to the social realm, hence normative discourse concerns the social realm.

Since normative discourse is involved in creating and sustaining a normative system, by analogy one may deduce that factual discourse is involved in creating and sustaining a factual system. I will not attempt to explore or justify such a thesis (or its negation) in this work. Whether or not one accepts an agency behind the factual system, for the purposes of this enterprise it is sufficient if the differences between those states of affairs which are brought about by the acts of human beings and those brought about otherwise are maintained.

Having made the preliminary distinctions between normative discourse and factual discourse and the types of system to which these discourses actually apply, I will now proceed to specify the basic conditions which need to be satisfied if a possible normative system is to be actualized. The propositions expressing the requirements belong to the normative discourse.

III THE REQUIREMENTS OF A NORMATIVE SYSTEM

There are at least five different but related requirements which need to be satisfied for a system to be normative. These are material requirements, which include both physical and psychological requirements; heuristic requirements, which tell one how the elements of a system are to be organized; hermeneutical requirements; teleological requirements; and finally, epistemological requirements, which include both a theory of propositions and semantics. In what follows I shall specify and discuss each of these requirements. The last requirement is evidently the most complex one. It is also the most important requirement, for it not only bears upon the explication of the other requirements mentioned above but also on some fundamental aspects of the nature of law. I shall hence devote a complete part to an analysis of the epistemological requirements of law.

III. i *Material Requirements*

a) Physical Requirements

i) The norms should take into account the physical capacities of the persons to whom they are to apply.

ii) The norms should take into account the relevant aspects of the appropriate factual system.

iii) The norms should take into account the average or the normal intelligence of the person to whom they are to apply.

Fuller mentions these three material conditions amongst his eight conditions which must be met if one is not to fail in making law (his sixth and seventh conditions).[5] He seems to assume that something specific about law has been said. These material requirements apply to all normative systems, whether it be a game of chess or an army; they do not characterize the conditions for law-making in particular.

b) Psychological Requirements

i) The norms should be as clear and distinct as possible so that they are understood by all. Norms can only guide conduct if they are intelligible.

Fuller's fourth condition for law-making comes in here.[6] The intelligibility of norms is necessary for all normative systems. Although this condition applies to law it does not characterize it specifically.

ii) The norms should be known to the people who are to mould their conduct in accordance with them.

In simple normative system, such as games, this second condition is easier to understand. But in complex normative systems, such as the law, the significance of this requirement is not clearly understood. Fuller rightly insists that a legal system must publicize all its laws (his second condition).[7] However, the necessity to make norms public is, once again, true of many normative systems. The grammar of a natural language, the rules of an educational system, the norms of games, are some examples of normative systems whose norms must be publicized. This requirement too does not tell us anything specific about law. Fuller's requirements, thus, concern normative systems in general, they do not characterize law.

III. ii *Heuristic Requirements*

The facts and their interrelationships have to be discovered. Such discoveries may lead to a knowledge of why the facts are related as they are in a factual system. In contrast to this in a normative system the order of the acquisition of knowledge is totally reversed. First of all one has to have some knowledge of why the system exists, i.e.

about its intended aims. Following this one has to know the means by which the aims are to be achieved; and finally the details about what constitutes achieving the aims. One cannot create a game without first specifying the aims of the game. Similarly one cannot form an association without first telling people what the association intends to achieve. The specification of purpose is conceptually prior in any account of a normative system; but as concerns a factual system, the knowledge of its purpose may or may not come as a consequence of an inquiry. Thus in a normative system the 'why' question takes a conceptual priority over the 'how' question, which in turn precedes the 'what' question. In actual practice, however, the answers to all the three types of questions may proceed simultaneously.

Normative systems are systems of feats created *ab initio* by human beings. The possibility of creating and sustaining a normative system seems to require at least nine different types of necessary heuristic principles. Heuristic principles are those principles which organize the material contents of a system in particular ways. They do not in themselves specify what the content is or must be. The heuristic requirements are specified in a normative discourse. They must be followed if the possibility that they describe is to be actualized.

The specification and actualization of all the nine basic types of heuristic principles would be necessary for a complex system such as the legal system. For simpler systems, which involve few human beings for simpler purposes, all the nine types of heuristic principles need not be explicitly specified, they can be assumed to be known. The number of heuristic principles which can be assumed to be known and the number of them that need to be made explicit would depend on the complexity of the system.

A normative discourse must contain the following basic types of heuristic principles concerning the normative system:

i) Principles which specify the systematic aims of the system.

ii) Principles which order the priorities of the aims.

iii) Principles which delimit the procedures by which the aims are to be achieved.

iv) Principles specifying the ways in which the system may be changed if the aims are not being achieved.

v) Principles specifying which persons, deeds and entities are to become members of the system and which are to be excluded.

vi) Principles specifying the propositions which are to count as members of the system.

vii) Principles specifying the conditions under which persons, deeds, entities and propositions may continue to be members of the system.

viii) Principles specifying the conditions under which persons, deeds, entities and propositions cease to be members of the system.

ix) Principles specifying what relationship the system has to one who (or which) ceases to be a member of the system, i.e. what may be done and what may not be done to one (if anything at all) when he (or it) ceases to be a member of the system.

The nine principles are not of the same logical type. They may be distinguished as follows: i) and ii) concern questions about the teleological ends of the system; iii) and iv) concern the issue of change and development and the methods that the teleological principles of the system permit; v) concerns the question of class membership; vi) concerns the issue of validity and truth of the normative propositions; vii) concerns the question of class identity; viii) and ix) concern the topic of class non-membership and its relation to the basic systematic aims of the system.

I shall discuss the conceptual peculiarity of each type of heuristic principle at relevant points. Here only a few remarks about the last heuristic principle need to be made since this principle is not usually mentioned in legal theories.

The question about the different ways a person ceases to be a member of a legal system and what may be done to such a person is complex and hence requires a detailed analysis. It will be discussed at length later while examining the issue about amending persons and groups (in Part IV, Section III). Here it will suffice to convey the point through some simple examples.

When some people cease to be members of the Mafia, the CIA or the KGB, these normative systems have to decide what to do with such former members. Often the decision may be simply to kill them. This certainly seems to be true for the Mafia. For former members of the CIA or the KGB it may entail a curtailed or secluded life. What will be done to a former member depends on the nature of the normative system in question.

The specification of these nine types of propositions results in the basic propositions of a normative system. It is important to note that to be able to achieve the normative ends the particular instances of the principles must not be conflicting. The principle of class membership, for example, cannot say that 'only people of class X can become members of the legal system' while the teleological principle says that 'all will be treated equally before the law'. Or, to take another example, it cannot be the case that the sixth principle says 'propositions X count as the rules of recognition in accordance with which the norms of the system are selected', when these norms turn out to make the achievement of the aims of the system (specified by the first principle) impossible.

Since normative systems require not only first-order propositions but also higher order propositions as listed here, it follows that all normative systems have a hierarchy of norms. In pointing out that in the legal system there is a hierarchy of norms one has not as yet said anything unique about law which will distinguish it from other normative systems. More needs to be said about the hierarchy to specify the distinctness of law as a normative system. A central theme in Kelsen's legal theory is that law is a hierarchy of norms. His arguments seem to imply clearly that in pointing this out he has said something special about law.[8] Pashukanis, I think, has rightly suggested that if a hierarchy of norms is a central feature of law then the military may as well be described as a legal system, for in no other system is the hierarchy of norms more clearly defined.[9] In Hart's legal theory too the notion that law is a union of primary and secondary rules plays a central role. Although Hart argues that in characterizing law one must also take into account the minimum content of natural law claims, he nonetheless often seems to suggest that something unique is being said about law in describing it as a union of primary and secondary rules.[10] There are arguments which seem to assert that in characterizing law as a union of primary and secondary rules both the necessary and the sufficient conditions have been specified.[11] Even if one were to accept that such an assertion is not intended it is not made explicit at any point in Hart's work that in talking about primary and secondary rules normativity is being discussed and not law. Being a union of primary and secondary rules, or any hierarchy of rules for that matter, is a property of many normative systems.

Rolf Sartorius, amongst others, has noted that there are many systems besides law which are a union of primary and secondary rules. He mentions games.[12] Fuller too has remarked that universities, trade unions, etc. are also unions of such rules.[13]

Sartorius' and Fuller's observations seem to me to be fundamentally correct, but still very narrow. They need to be generalized for all normative systems. The point about the development of primary and secondary rules in other systems besides law can become more explicit by considering different types of systems. Games and various athletic events have been evolving primary rules about how they are to be actually performed, and secondary rules about who is to validate or make the primary rules. The International Hockey Federation and the Olympics Committee, for example, are bodies which are formed on the basis of the secondary rules of recognition and which provide and validate the primary rules. However, to illustrate this point one does not have to think only of those normative systems which involve playing games. Educational systems such as universities and schools set primary rules which are then validated and regulated by the secondary rules set by educational boards. Even in cases where the matter is one of mere convenience there has been a necessity to develop good secondary rules which give precise power to a group of people to validate and change primary rules in the field. For example, for the language of chemistry the International Union for Pure and Applied Chemistry is recognized by the secondary norms to be validating the primary norms of the language. The primary rules in various other fields such as aviation, computer languages, navigation, radio communication, weights and measures, to mention only a few, have been provided by changes and developments in the secondary rules which are accepted by all those involved in the relevant fields of expertise. These changes have been brought about to facilitate activities and make things more easily accessible or comprehensible.

It may seem that Fuller presents an alternative to Hart's view when he contends 'trade unions and universities to be imperfectly achieved systems of law' which may 'often cut more deeply into the life of a man than any court judgement ever likely to be rendered against him'. 'But such infirmities', according to Fuller, 'are to be expected from all systems of law, big and small'.[14] This contention does not really provide an alternative to Hart's view. In fact on a closer examination it is not even as different from Hart's view as it is assumed to be. In deciding to characterize social organizations which are constituted by a hierarchy of norms as 'legal', Fuller, like Hart, equates the formal property of normative systems with that of legal systems. The difference lies only in the fact that whereas Hart wants to call only one specific social organization a legal system on the basis of a normative property, Fuller finds many organizations 'legal', albeit to different degrees. Hart and Fuller are thus in agreement about a part of the *connotation* of the concept of 'law'—namely that it connotes organizations having primary and secondary rules. What they differ on is the *denotation* of the concept. From what I have argued before it follows that both these contentions are erroneous. Fuller's mistake seems to arise because of his examples. These relate to only one kind of human action, the kind which involves some transaction and bargaining and, hence, in which some adjudication is possible. What he overlooks is that adjudication is only accidental in such normative systems. The essential normative end of a university is to educate, not adjudicate. Similarly, the main function of a trade union is to protect the interest of its members, not to punish people. In legal systems adjudication and punishment are essential ends, not accidental ones. Adjudication may even occur within a family where the father acts as a judge or negotiates between two children like a lawyer. A family does not thereby become a legal *system*, although the acts done by the father in that particular instance are legal. For a system to be *legal* the performance of such acts must be essential to its nature. Law negotiates or adjudicates all the time. Other institutions such as the family, the university and the church, have different essential functions. We adjudicate, negotiate and evaluate in various situations. Although all such acts are legal acts, they do not by themselves as yet form a legal system. The notion of a system, as we have seen, requires that many more conditions be fulfilled. Families, universities and trade unions, hence, are not 'legal systems small and big'. They do not become legal systems because legal acts such as adjudication and negotiation sometimes occur in them. They are different systems based on different requirements of society. To assume that the family orthe university is a small legal system because there are some legal aspects to it is like assuming that a legal system is a recreational or an educational system since there are dramatic and educational aspects to it. Milner S. Ball, for example, has emphasized the theatrical aspects of court-room proceedings.[15] The theatrical elements that Ball ascribes to law cannot be denied. However, whether one can understand any essential aspect of law on the basis of these elements seems dubious.

For, firstly, the theatrical elements are present in many ceremonial activities, including most communal religious activities. Secondly, this analogy misses the main difference between a real theatre and the theatrical aspect of court-room proceedings. The decisions made in drama function very differently in the actual world from those made in a court room.

Legal codes and proceedings also have an educational effect on those involved with them in any way. One learns about justice, morality and social problems. But from this it would not be right to conclude that court rooms are universities. If institutions are to be distinguished from each other one must characterize them in terms of their essential functions and elements.

We find thus that in different ways Hart, Kelsen and Fuller have made similar errors in ascribing to law properties which actually belong to the notion of a normative system. Summer criticizes Fuller's account on the grounds that a proliferation of legal systems fails to distinguish other organizations from what the jurists call law.[16] As I have shown, he is right in this criticism, but then the question still remains: what, exactly, is it that is different from other organizations which the jurists call law? Since the property of having a hierarchy of norms is common to many normative systems, only a unique hierarchy can characterize law. This hierarchy must be specified. Similarly, only a particular union of primary and secondary rules can belong to law. This union must be justified. We shall subsequently see what such a unique hierarchy and union of norms can be. At this stage it is important to discuss another requirement which applies to law because it is a normative system.

III. iii *Hermeneutical Requirements*

The hermeneutical requirements of a normative system distinguish a closed system from an open one. A closed system can be interpreted only in a finite number of ways, whereas an open system allows any number of interpretations. Such possible interpretations, whether finite or infinite, are not arbitrary or mutually inconsistent. They are related in ways that allow the achievement of the systematic ends of the system as defined by the heuristic principles. The 'openness' of an open system, hence, is in a fixed direction. Any number of propositions can be generated in that direction. The limits and the boundaries of the direction in which the propositions can be generated are defined by the heuristic propositions taken together. A good way to make the idea of an open normative system comprehensible is to consider the working of modal music, especially the notion of raga in Indian scholastic music. Each raga is a particular open normative system in music whose norms of internal structure and norms of rendering or development are decided beforehand. A raga can be rendered in any number of ways by different human beings, but it always yields the same type of melody.[17] Legal and other open normative systems are open in exactly the same sense in which a raga is open.

Analysing the notion of openness in terms of the rules of interpretation which base themselves on the basic principles that generate first-order propositions seems to me to be more promising than any attempt to formulate it in terms of some arbitrary deontic formulae.[18] However, any such Chomskyian attempt is faced with one serious problem, the problem of explaining counter-examples, i.e. any proposition which apparently seems to belong to the system but which has not been generated by the basic principles of the system.[19] In such cases the basic generative principles seem to yield both p and not-p. The consideration of modal music makes it explicit that given the internal constraints of the system, the system cannot yield any arbitrary or contradictory propositions; in this case it cannot yield any melodic phrase or a combination of notes that does not belong to the raga. Every inconsistent proposition is introduced only as an error and will not be compatible with the rest of the system. Similarly, all those propositions which are only apparent members of the legal discourse could not have been generated by the basic principles of the system; all such propositions will be inconsistent with the basic heuristic principles of law.

When can a normative system be closed and when must it remain open? Is there a criterion that can guide us in this matter when normative systems are being created? There is indeed one and it does not seem difficult to discover. This criterion follows from the very idea of a norm. A norm describes the possibility of a feat and in normative systems such possibilities are actualized. This provides two possible conditions under which one can create a closed normative system:

(a) if the norms can describe the feats exactly; and

(b) if the possibilities can be actualized in only a finite number of given ways.

If these conditions are not met then one must create and sustain an open normative system. The actualized possibilities proposed by the norms populate the normative systems and determine its ontology. This requirement amounts to the condition that if the exact ontology of the normative system cannot be predetermined, one must create and sustain an open normative system. For law, as we have seen while discussing the issue of incompleteness, a predetermination of the ontology is not possible.

We create various games in which the norms describe the feats exactly and thus predetermine the ontology of the system. For example in the game of cricket we predetermine who is supposed to do what, and what actions are possible. The theoretical terms in the norms, such as 'out' and 'catch', can be given a specific interpretation in every cricket match. As against such a closed system the norms of an open system can at best describe only possible classes of feats, such as 'murder' and 'theft', and not particular ones. The theoretical terms in such norms have the property of what Friedrich Waismann calls '*prositāt*' (openness),[20] i.e. their meanings are open to change, but on this account they are not vague. Due to such theoretical terms each legal norm is a general norm which has to be interpreted for application in each case. For the possibility of such interpretations the normative system must include its heremeneutical principles in the normative discourse. These principles must explicitly mention the normative ends in accordance with which the interpretations are to be done. The following principle from the International Convention on Civil and Political Rights illustrates the point:

> Article 5
>
> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.[21]

As this norm shows, the hermeneutical principle is required to operate in conjunction with other principles of the system. However, before I discuss the relationship that obtains between the hermeneutical principles and other principles of the system, it will be important to examine some related views about interpretation. A discussion of these related views will show why it is necessary to emphasize the issues about interpretation mentioned here.

Kelsen's view is perhaps characteristic of all legal positivism. He argues: 'from the point of view directed at positive law there is no criterion by which one possibility within the frame is preferable to another. There is simply no method by which only one of the several meanings of a norm may gain distinction of being the only "correct" one. ...all methods of interpretation developed so far lead only to a possible, not a necessary result...'[22] Kelsen calls the heremeneutical principles of law a matter of legal politics,[23] and he also asserts that all legal norms are general norms which need to be interpreted for application in every case.[24] Now if all these arguments are taken together it follows that every case of adjudication or application of law is a case of legal politics. Kelsen does not, however, explain what he means by 'legal politics' and how this is to be distinguished from law. If every interpretation of norms is a matter of legal politics (in whatever sense Kelsen means it) it is difficult to see how his theory is a 'pure' theory of 'law', it would be better called a 'pure theory of legal politics'.

Kelsen is not only mistaken in asserting that there is no criterion according to which one possibility within the frame is preferable to another but also in saying that all interpretations are only possible ones and not necessary ones. As I shall show, there are specific criteria for interpretation and certain interpretations are not only possible but also necessary. Kelsen's error here, as will be evident subsequently, lies in his failure to distinguish law from politics.

C. K. Allen discusses Montesquieu's principles of statutory interpretations. He points out that they deal only with the style of drafting statutes.[25] For an appropriate interpretation, Allen tells us, the 'golden rule' must be kept in mind: the rule that the *general purport* or the *ratio legis* governs the interpretation of norms.[26] This remark seems to me to be pertinent. But the basic question is: what is the *ratio legis* on the basis of which the norms are to be interpreted? Allen concludes that the principles of statutory interpretations form one of the less stable, less consistent and logically less satisfying branches of jurisprudence.[27] He did not seem to notice that if interpretations have to be based on the *ratio legis* then, evidently, until the latter is well understood the principles of statutory interpretation can never be clear.

Two relevant discussions which make the import of legislation the central factor in interpreting norms are those of C. P. Curtis and Gidon Gottlieb.[28] Although their analyses do not go beyond the usual emphasis on the notion of the purpose of law, it will be relevant to consider their views because their analyses raise some important issues from another perspective.

Gottlieb is certainly right in pointing out that Hart's and Kelsen's theories are an improvement upon the so called 'one word one meaning school' of semantic theory, for their theories allow more than one interpretation, which is essential for applying the norms to different cases.[29] However if, as Kelsen argues, there is no limitation on the way in which norms must be interpreted, or if there is no restriction on the number of possible interpretations, then such an 'improvement' of the semantical theory only proliferates possible interpretations without giving them any directions or limitations.

Curtis confines the meaning of legal documents to applications to the particular. According to him, 'words are but delegations of the right to interpret them, in the first instance by the persons addressed, in the second and the ultimate instance by the courts who determine whether the person addressed has interpreted them within their authority'.[30] Although such a view rightly brings the person (to whom the proposition must mean something) back into the context, it leaves the basic question unanswered. For one may proceed to ask: on what basis does the court determine whether the persons involved have interpreted the norms within their authority? To assume that the courts interpret the norms according to their whims and fancy is certainly to misunderstand the proceedings. Since there is an overall consistency and similarity in the way the various courts interpret the norms, the rule of interpretation must be objective and not a personal decision of some judge or judges.

Hart's notion of the context for a legal norm or term is wider than that of Curtis'. His context is not confined to some persons or courts, it covers the whole legal system.[31] However, Hart does not seem to have appreciated what conceptual relationships obtain if one considers the whole legal system to be the context for a legal norm or term.

A normative system is structured in accordance with heuristic principles. One cannot claim to have considered the normative system as the context if one takes into account only some of the heuristic principles. All of them, together with their consequences, must be taken into account to determine the actual context. Moreover, since the normative system is created and sustained on the basis of the heuristic principles, one cannot claim to have understood what the normative system is while failing to understand its basic heuristic principles. Since the context of a norm is the context of all the heuristic principles and since a normative system is comprehended only in terms of all its heuristic principles, it follows that no norm can be interpreted independently or arbitarily. The heremeneutical rules must be constructed in such a way that they take into account all important heuristic principles. Ideally the hermeneutical principles must be such that they yield only those interpretations which are conistent with the requirements of all heuristic principles. Only a necessary set of possible interpretations can be consistent with all the heuristic principles taken together at any time. For example only a necessary set of possible interpretations can be consistent with the heuristic principles which define the systematic aims of the system, or those which define and delimit possible ways of achieving those aims. Not just any or every interpretation of a norm can become a further member of the system. Interpretations of a norm in a particular context will, thus, result in a correct interpretation or a set of possible correct interpretations. This will depend upon the system in question. Closed systems will yield definite interpretations and open systems will yield some roughly equivalent interpretations.

The necessity of interpreting the norm in a particular way does not lie within the norm, it arises from the nature of the whole normative system. It is required on account of the systematic aims and other heuristic principles of the system. Kelsen and others have not found it necessary to interpret the norms in specific ways because they have not considered the holistic framework within which the hermeneutical principles function. We shall subsequently see the various necessary propositions of law which regulate the hermeneutical principles.

III. iv *Teleological Requirements*

Law is a dynamic system. Minor changes in the law occur regularly in every case of adjudication or legislation. However, only with major changes, such as constitutional amendments, do we become more aware of the dynamic aspects of law. The notion of teleological development involves two ideas: the idea that there are some ends towards which all dynamic normative systems are propelled, and the equally important notion of dynamicity itself. What is involved in recognizing law as a dynamic normative system?

Some thinkers, such as Kelsen, seem to have believed that by characterizing law as a dynamic system something specific was being said about it. This again is the fundamental error of taking a particular attribute to belong specifically to the idea of law when in fact it belongs to many normative systems. By merely pointing out that law is regulated in its dynamicity by some norms one has not as yet distinguished law from other similar normative systems. To be able to do so it would be necessary to make at least three further distinctions: a) what is unique about the norms which regulate the dynamicity of law; b) what is the peculiarity of the direction in which law changes; and c) what are the particular ends towards which law moves (which are not the concern of any other dynamic normative system).

At the outset one would have to begin by distinguishing between different sorts of normative systems which are dynamic.

a) The Dynamics of an Open Normative System

Kelsen distinguishes between a static and a dynamic normative system in the following way: 'A system of norms whose reason for validity and content is deduced from a norm presupposed as a basic norm, is a static norm system.'[32] He does not, however, give examples of any static normative systems. Perhaps he has logic in mind, a system in which the propositions are deductively correlated. But then he does not explicate how logic is a *normative* system. As against this static system, he tells us that: 'the dynamic type is characterized by this: the presupposed basic norm contains nothing but the determination of a norm creating fact, the authorization of a norm creating authority, or (which amounts to the same) a rule that stipulates how the general and the individual norms of the order based on the basic norm ought to be created.'[33]

This characterization does not distinguish the dynamicity of law from the dynamicity of open normative systems. Language, for example (as all Chomskyians can now tell us) has basic norms which stipulate how the general and the individual norms of the language ought to be created. In fact Panini, who wrote his *Astadhyayi* about two thousand years ago, provided a very precise grammar for the Sanskrit language which later became a grammar of 'presupposed basic norms containing nothing but the determination of a norm creating fact'.[34] In modern English we turn to the Oxford dictionaries for the most authoritative norms concerning words, etc. All modal music also works in a similar way. Perhaps with sufficient insight and ingenuity one may be able to spell out the basic transformational and generative principles of any open normative system.

Kelsen's account of legal dynamicity is thus superficial. It fails to distinguish the grounds and the nature of the dynamics of law from those of open normative systems in general.

b) The Dynamics of a Cybernetical Normative System

Law is distinguished from some open normative systems, such as that of modal music, by the fact that a legal system has basic self-amending norms on account of which it can maintain the direction of its growth. Basic principles of amendment provide the measures by means of which the system can adapt its actions and structure its features to meet social, biological or physical needs.

One may think that the truth that law has basic generative norms as well as the amending principles which allow for adaptation provides the necessary and the sufficient conditions for characterizing it. This, however, is not the case. The possession of generative and amending principles characterizes a *cybernetical* normative system and not a legal system. These aspects only tell us that a particular open normative system is a cybernetical system. They do not as yet tell us why a particular cybernetical system is a legal system.

All cybernetical systems have the property of changing and developing through self-regulation and adaptation in accordance with feedback from the environment and in accordance with the specific needs of the habitat. In a strict sense language, like law, is a cybernetical system.[35]

The dynamics of a juristic cybernetical system, i.e. the legal system, have to be distinguished from the dynamics of open normative systems in general and cybernetical systems in particular. Carrying out such a task would involve explicating the three conditions mentioned earlier, conditions which specify the uniqueness of legal dynamics. Kelsen's, Hart's and Fuller's theories seem to be grossly inadequate when it comes to understanding the dynamics of law. Spelling out the teleology of law evidently involves showing how the principles of dynamics of law are *substantively* different from those of other open or cybernetical normative systems. This issue will be dealt with in its appropriate place later when I discuss the substantive aspects of the nature of laws.

REVIEW AND CONCLUSIONS II

THE REQUIREMENTS OF A LEGAL THEORY

The basic requirements for a legal theory can now be precisely specified.[1]

1. The theory should specify the sense in which law is a system. In doing this it will distinguish the different orders of propositions which form the system.
2. The theory must specify what makes a system normative. In so doing it will show how derivative normative propositions can be generated from the basic normative principles.
3. For each of the nine heuristic principles the legal theory should specify a unique content.

The rest of the requirements follow from the specification of the basic heuristic principles. In specifying a unique content for each heuristic principle a hierarchy of norms will be presented. The legal theory is then required to:

4. Justify why only a particular hierarchy of norms belongs to the system.
5. Account for the different methods by which the systematic aims of the legal system are achieved.
6. Specify the unique dynamics of law.

So far in this work only requirements 1 and 2 have been examined. A major part of the second requirement concerning the epistemological requirements of a normative system remains to be discussed. On completion of this task the remaining four requirements of a legal theory will be examined.

In requirement 3 there are nine different principles which need to be given unique contents, hence some further explicatory remarks will be important here. The specification of the heuristic principle concerning membership of propositions in a normative system will limit the types of rules that can be accepted as *grundnorm* or as rules of recognition. Not just any arbitrary rule of recognition can be accepted as being a rule in law. Requirement 4 will justify the choice of the rule of recognition or the *grundnorm*. The heuristic principle specifying the systematic aims will delimit the legal aims. The heuristic principles concerning the membership of entities, persons and actions specify the ontology of law. The legal theory will, therefore, specify and justify the possible legal ontology when it provides unique contents to these heuristic principles. Consequently the theory will also justify what is done to entities which cease (either in part or totally) to be members of a legal system.

Requirement 5 allows for a number of ways to achieve the ends specified by the heuristic principle. It would be arbitrary to assume that such ends can be achieved in only one way. As argued before, it is not unreasonable to believe that men are creative agents. It is always possible, therefore, that novel methods will be found to achieve the desired legal ends. The legal theory must account for such a plurality of possible methods.

Amongst possible legal methods Fuller mentions adjudication, legislation, mediation, managerial direction, elections and contracts.[2] Since there is a plurality of legal methods he is undoubtedly right in insisting that to describe a society as 'pre-legal' merely because it practices mediation and not adjudication is to misunderstand the idea of law in a serious way.[3] However, the fact that different procedures are employed to achieve the systematic ends of law should not be confused with the notion that different social institutions are attempting to achieve the same ends. The plurality of legal methods does not mean a plurality of legal institutions. There seems to be a serious confusion in Fuller's theory when he claims to be a legal pluralist. He not only mentions different legal methods but also calls universities, trade unions, etc. imperfect legal institutions. Such a confusion, as noted before, arises in his theory due to the fact that he overlooks the substantive differences which distinguish the function of a legal system from that of other social institutions.

According to Kenneth I. Winston, Fuller's legal theory can be understood as attempting to meet the requirements set down by a fictional Justice Foster.[4] These are: 'generosity', i.e. the theory must allow for legal pluralism; 'purposiveness', i.e. the theory must show law to promote some definite ends; and 'normativity', i.e. the theory must make explicit the morality that law promotes among men.[5] These requirements are too general. However, Winston's claim that Fuller's theory satisfies Justice Foster's requirements seems to be unsubstantiated.[6] As we have seen, although Fuller talks about the morality internal to law, he does not succeed in specifying this morality. The aspects that he mentions apply to many normative systems. The morality internal to law still remains to be shown and Justice Foster's general, but correct, requirements still need to be satisfied.

The criticisms of Hart's, Kelsen's and Fuller's theories presented so far do not imply that there are no substantial points in their theories. The discussion of the substantial points, however, cannot be undertaken until we have found a way to clearly distinguish between normative systems in general and the legal system in particular. The most basic criterion for distinguishing between different normative systems, as I have suggested, is to be found by investigating their epistemological foundations. Once the legal system has been distinguished and identified on the basis of its epistemological foundations, its substantive aspects can be clearly described. Hence I shall proceed now to examine the epistemological foundations of law.

PART III

THE EPISTEMOLOGICAL REQUIREMENTS OF NORMATIVE SYSTEMS

I THE NEED TO INVESTIGATE THE EPISTEMOLOGICAL FOUNDATIONS OF LAW

Basic principles of law are amongst its most important elements. Unless the nature of such propositions is clearly understood one cannot tell whether one is dealing with religious, political, legal or some other types of propositions.

An analysis of the nature of basic legal propositions will reveal their truth conditions. To know the truth condition of a proposition is to know the conditions under which they can really apply to a possible world. The truth conditions for analytic propositions, for example, are different from those for synthetic propositions. Our assumptions about the nature of propositions determine the type of activities that we carry on apropos those propositions. For example if basic legal propositions are descriptions of facts like the law of gravity, then they must be discovered the way the propositions of natural sciences are. But if they are like mathematical propositions then the type of activity required to come to know them would be totally different. Or, if such basic propositions are still different, say like the propositions involved in games, then we must come to know them in yet another manner. Different types of propositions not only require different methods for acquiring knowledge about them, but also totally different types of justifications when we want to hold them as true or valid. Thus, factual propositions have to be justified through experiments, observations, etc. whereas mathematical propositions are justified by deducing them from more basic propositions. Propositions of games on the other hand are justified in still another way.

Some natural law theorists have argued that basic legal propositions are about a certain aspect of the world, such as human nature or the nature of reality. The Stoics and some thinkers in the Brahmanic tradition (who make *rita* a feature of *prakriti*) would fall into this group. Are basic legal propositions factual propositions according to these thinkers?

Hart too argues that basic legal propositions, such as the rules of recognition, are matters of fact. The sense of 'fact' here seems to be different from the usual one. Perhaps Hart means they are facts about human society and not about human nature. But in either interpretation the basic legal propositions seem to become factual propositions.

Some natural law thinkers have argued that basic legal propositions are derived purely from reason. Does such rationalism imply that basic legal propositions are analytic propositions?

Legal positivism demands that we justify basic legal propositions in one way, natural law demands that we justify them in another way. How we come to know and justify a proposition, as noted, depends upon the nature of the proposition. A fundamental issue in legal theory is thus: *what is the epistemological status of basic legal propositions*? The epistemological inquiry into the nature of basic legal propositions opens up an alternative approach to settle the dispute between various legal theories and consequently to understand the nature of law.

It is necessary to ask what is behind the different types of justifications that the natural law theory and positivism demand. What difference does it make how we justify a proposition? The basis on which we assume a proposition to be valid or legitimate is directly related to the way we think that the proposition needs to be justified. For example we accept a mathematical proposition to be valid or legitimate on the grounds that it has been justified in a mathematical way by mathematicians. Similarly we assume that a scientific proposition is legitimate on the grounds that it has been justified to be so by scientists. Thus it makes a crucial difference how we expect a proposition to be justified. The types of people and the types of conditions which provide legitimate propositions are different in each case. The people who satisfy the conditions are taken to be the genuine authors of the particular types of propositions that they assert. Thus mathematicians are genuine authors of mathematical propositions and scientists of scientific propositions. Doctors are authors of legitimate propositions about people's health. Who are the genuine authors of legitimate and valid legal propositions? The answer to this question, as would be evident from the foregoing discussion, clearly depends upon the type of propositions that we take legal propositions to be. If, together with Hart, we take legal propositions to be matters of fact, then legal 'scientists' who have 'discovered' them in a 'scientific' way must evidently be the genuine authors of factual propositions. Only those who have a good knowledge about facts and their interrelations should be telling us what legal propositions must be. Lawyers and jurists do not qualify to tell us about facts, scientists do. Psychologists, for example, know a great deal about human nature. If basic legal propositions are facts about human nature then psychologists must be accepted as the authors of legitimate legal propositions. If on the other hand basic legal propositions are social facts in Hart's sense, then sociologists and historians who know most about such facts must be the authors of legitimate and valid legal propositions! However, if basic legal propositions turn out to be like mathematical propositions then people who know the most about definitional structures and relations of laws must be taken to be the genuine authors of legitimate and valid legal propositions. Or supposing, on examination, it turns out that legal propositions are not even descriptive, that they have the form 'You must do X', i.e. a sentence that commands, then the conditions under which such propositions can be genuine commands is that someone should will it to be so. The real authors of legitimate and valid legal propositions in such a case would be those who can command. All that we would need to do therefore is to recruit good commanders who could bring all the laws into existence. However, as we have seen in the previous section, legal propositions never have the form 'You must do X', hence any commanding ability cannot be relevant to the reasons for being authors of legitimate and valid legal propositions.

Those who are taken to be the genuine authors of legitimate and valid legal propositions are said to have the authority to assert such propositions. The central aim in labouring the question in the manner done here is to show that the question: *what is the basis of legal authority* cannot be answered independently of the question: *what is the nature of legal propositions*. The two answers are conceptually related. The basis of legal authority depends upon the nature of basic legal propositions. This is so because the truth conditions for what is to constitute authority to assert certain propositions depend upon the justification conditions for those propositions. The justification conditions in turn depend upon the nature of the propositions under consideration. This makes it extremely important to decide the nature of basic legal propositions.

The procedure of the investigations shall be as follows. The ensuing discussion in this part of the work is divided into four sections. I shall first discuss the theory about types of propositions, clearly specifying the type that basic legal propositions can and the types that they cannot be. The results of this discussion will be applied to some actual legal propositions in the second section so as to substantiate and explicate the conclusions reached. In the third section I shall examine the nature of legal entities. Such an analysis is required because to specify the nature of legal propositions it is necessary to know the relationship that obtains between the legal-subject and the legal-object in such propositions. The fourth section will be devoted to the final conclusions about the nature of basic legal propositions and its relationship to the basis of legal authority.

A few words about the expected shortcomings will not be out of place here. Questions about propositional theory and theory of types raise enormous problems. Difficult as these issues are, if any light is to be thrown on the nature of basic legal propositions, indulging and taking sides in these complex topics cannot be avoided. The best that can be done here is to show the kind of propositional theory and the theory of types that are appropriate for legal discourse. In other words the work here is limited to explicating the relationships that hold between the idea of law and the foundational issues concerning the nature of propositions and entities. However, a discussion of epistemology in the concrete context of law raises many important questions for epistemology in general, questions whose significance become explicit only when thrown into relief by a discussion of legal discourse. These important issues in epistemology, since they are not directly relevant for the purport of this work, are only outlined in this enterprise and not discussed in any detail.

II PROPOSITIONAL FORM AND PROPOSITIONAL JUSTIFICATION

Social organizations assume or stipulate some propositions as their basic working principles. These foundational propositions are defined in specific ways by the people involved. Such definitional propositions are, in an important sense, analytic. By defining a particular way of doing things one may create and sustain a convention. Are the rules of recognition and other basic legal propositions definitional in this sense? I shall argue that they are not. Basic legal propositions cannot be defined in an arbitrary manner. Propositions which are not mere definitions can, in a significant sense, be synthetic.

There are four basic questions that one must ask about basic legal propositions. Are such propositions analytic or synthetic? Are they a priori or a posteriori? Are they necessary or contingent? Lastly, the most significant question: are the categories mentioned here sufficient and appropriate for characterizing basic legal propositions?

In so far as legal propositions are *propositions*, I shall argue that the above categories are indeed appropriate for characterizing them. But in so far as such propositions are *legal* propositions, these categories are not sufficient to make some crucial points about them. Further distinctions are required to single out the peculiarity of basic legal propositions in particular and normative propositions in general.

I shall argue that a certain type of analytic propositions is at the base of conventions. These propositions are distinct from the type of synthetic propositions which is at the base of legal systems. These different types of propositions are justified in totally different ways. Both types of propositions, however, are necessary; but the sense in which they are necessary differs in a radical way.

This requires that we first distinguish different types of analytic and synthetic propositions, second, the manner in which they are justified, and third, the different senses in which propositions are necessary.

In what follows I shall first briefly discuss the basic differences between analytic and synthetic propositions and their modes of justification, showing the basic grounds for the distinctions. At the second stage I shall discuss the analytic propositions so as to clearly specify the type which is at the base of conventions and which, thus, needs to be distinguished from basic legal propositions. I shall also attempt to show the sense in which such basic propositions of conventions are informative. At the third stage I shall discuss synthetic propositions so as to specify the type which forms the foundations of law. This stage will also require explicating the sense in which such basic propositions are necessary.

II. i (a) *The Analytic-Synthetic Distinction*

The traditional characterization of propositions as analytic or synthetic has come under criticism following Quine's and White's attack on the distinction.[1] The issues involved in these criticisms are indeed complex. But despite Quine's and White's objections I think the distinction still remains useful and legitimate if one specifies the sense and the purpose for which the distinction is being made. I will not attempt any detailed justification for this distinction. Nonetheless at the outset it will be important to state the most fundamental reason on account of which I give myself the liberty to employ such distinctions despite recent criticisms.

The manner in which the distinctions between analytic and synthetic, a priori and a posteriori, and necessary and contingent propositions are presently being made can be traced back to Lebiniz's and Kant's works. It is important to note, however, that in both Leibniz's and Kant's works the epistemological distinctions are not made for their own sake, they are made in order to solve some basic problems in metaphysics, moral philosophy and philosophy of religion. Their epistemological distinctions thus are related to and grounded in their other branches of enquiry. It is questionable whether one can borrow Leibniz's epistemological distinctions while totally neglecting or rejecting his metaphysical, moral and religious beliefs. In Leibniz's scheme the epistemological distinctions function in a possible world in which each monad has a specific place within not only the logically possible conceptual order but also the morally possible conceptual order. God too belongs to the same scheme, he being the most senior monad. Similarly it is doubtful whether Kant's interpretation of the epistemological distinctions can be maintained without the related metaphysics about the noumenal reality being distinct from the phenomenal reality and the related role of the self and God in each of them. Analytic philosophers have indulged in the Leibnizian and Kantian distinctions not only while neglecting metaphysics but while also at the same time calling it nonsense, thus depriving the distinctions of their basic roots. Quine seems to have successfully shown that the analytic–synthetic distinction cannot be maintained on a semantic basis. But then neither Kant nor Leibniz seem to have held that epistemological distinctions are linguistic distinctions, or that they can be sustained on the basis of distinctions in language alone. In the subsequent discussions I shall briefly sketch the metaphysical roots of the epistemological distinctions. These discussions are not in any way intended to be a complete reply to Quine's and other attacks on the distinctions. They only intend to show why it is reasonable to use these distinctions despite the criticisms. To start with, it would be important to define the distinctions.

Like Leibniz and Kant I take analytic propositions to be distinct from synthetic propositions for two basic reasons.[2] First, the negation an analytic proposition is self-contradictory. A proposition p is thus analytic if and only if its negation is of the form (or leads to the form) q and not-q. A synthetic proposition on the other hand is such that its negation not-p is not of the form (nor does it lead to the form) q and not-q. This division is exclusive and exhaustive. That is, the negation of all propositions is such that it is either of the form q and not-q, or its negation is not of this form. Such a characterization of course only concerns propositions. It does not imply that all human discourse consists of propositions. Discourse which is not propositional would be classified in other ways.

Second, analytic propositions are distinguished from synthetic propositions by the fact that in the former the predicate concept is contained in the subject concept, in the sense that the predicate concept is a constitutent of the subject concept and can be shown to be so by analysis. In synthetic propositions the predicate concept is not a part of the subject concept. Such a criterion can evidently only apply to propositions which are of the subject-predicate form. Legal propositions, as we have seen, are indeed descriptive propositions of the subject–predicate form, in which the subject and the predicate are joined together by the nexus. Basic legal propositions too, as we shall see, are grammatically of the same form. The criteria provided above state only the necessary conditions for distinguishing analytic propositions from synthetic ones. They cannot be taken to be both necessary and sufficient. However what we require first of all are the necessary conditions on the basis of which one can recognize the differences between the different types of propositions.

II. i. (b) *The A Priori–A Posteriori Distinction*

Kripke has emphasized that a proposition being analytic does not entail its being a priori or necessary; that whereas analyticity is a linguistic notion, apriority is an epistemological one and necessity a metaphysical one. None of these notions can be tied together without producing additional arguments to show how the relationships hold.[3] Hanson had earlier equally emphatically made the point that the notion of analyticity should not be tied up with that of apriority without sufficient justification.[4] Both Kripke's and Hanson's points seem to me to be correct. Their criticism, however, applies more appropriately to the Logical Positivists and some analytical philosophers who had equated analyticity with apriority, than to Kant.

Following Kant I take the distinction between a priori and a posteriori to depend upon a qualitatively different point. To characterize a proposition as a priori is to say nothing about its grammatical structure, or the structure of its negation, or the consequences derivable from them. It is to remark about the mode whereby the truth of the proposition is discovered. A proposition is a priori if its truth can be justified through reasoning alone, i.e. if to prove the truth of the proposition one does not have to appeal to a criterion of knowledge which requires observation, testimony, appealing to authority, revelations, etc. On the other hand a proposition is a posteriori if in order to justify it as true reasoning alone is not sufficient and some appeal to facts or experience gathered through perception, testimony, intuition, etc. is required.

The analytic–synthetic distinction thus distinguishes between *propositional forms*, whereas the a priori-a posteriori distinction distinguishes between different types of *propositional justifications*. Once this distinction is perceived it becomes evident that there can be four types of propositions. All the four different types are logically possible, none of them involves inconsistent ideas. The four types of propositionss are: i) analytic a priori; ii) analytic a posteriori; iii) synthetic a priori; and iv) synthetic a posteriori.

Despite the fact that each of these notions about propositions is logically consistent and independent, philosophers have often not only related these notions, but even equated them. For the purposes of this work, however, it is not necessary to discuss the various ways analyticity and apriority have been defined and related. The following chart summarizes the different views put forward. The views which seem to me to be right and useful for the purposes here are singled out.

In this table the description of the proposition, i.e. the criterion, is put in the middle. If the proposition fits the description its characteristic is named by the term on the left, if it does not then by the term on the right. The fact that the same criteria occur both in the table of analytic–synthetic distinctions and a priori–a posteriori distinctions shows that some thinkers have mistakenly assumed the distinctions to be making the same points.

1.	Analytic.	Predicate contained in the subject.	Synthetic.
2.	Analytic.	Cannot be denied without contradiction.	Synthetic.
3.	Analytic.	Logical truths or reducible to such.	Synthetic.
4.	Analytic.	Reducible to statements of identity by putting synonyms for synonyms.	Synthetic.
5.	Analytic	True in all possible worlds.	Synthetic.
6.	Analytic	True by virtue of meaning alone.	Synthetic.
7.	Analytic.	Does not require empirical test.	Synthetic.
8.	Analytic.	Does not admit empirical test.	Synthetic.

1.	A Priori.	True by virtue of meaning alone.	A Posteriori.
2.	A Priori.	Does not admit empirical test.	A Posteriori.
3.	A Priori.	Does not require empirical test.	A Posteriori.
4.	A Priori.	Its truth cannot be justified by appealing to experience.	
5.	A Priori.	Requires a transcendental argument for justification.	
6.	A Priori.	Requires a deductive proof.	A Posteriori.

From the first table only senses 1 and 2 seem to me to be right and useful for the purposes here. Sense 5 is partly right; it raises complex issues which need to be distinguished. I shall discuss the application of the analytic propositions to the world very briefly here, but the theme will be developed as we go along, specifically in Part IV where I discuss the idea of possible worlds. In the second table only senses 4 and 5 seem to me to be right and useful for the purposes here. The notion of transcendental justification will be presently discussed in the context of synthetic propositions.

II. ii. (a) *Analytic A Posteriori Propositions*

To create and sustain any convention, whether it be one of games, rituals or political activities, the basic concepts involved in the convention have to be defined. These definitions take into account the empirical factors involved in the activities. In the course of time the convention may become a custom or a tradition. For example to create the convention of playing polyphony in a particular way one has to define the chromatic scale as the tempered scale. Such a definition makes harmonizing various instruments possible. The utility of the scheme is tested out in practice. Similarly the proposition 'the metre rod in Paris is one metre long' provides the basic criterion on the basis of which the convention of measuring things becomes possible. It must be emphasized that when I say that the basic definitional propositions come first in these conventions I only mean conceptually first. In actual practice the definitions are evolved in accordance with the development of the conventions. Our interest in these definitions, however, is not in when they are developed, but in their epistemological status, in whatever order they come into being.

Since all conventions are based on some basic definitions of concepts and activities involved in them, they all have analytic propositions at their foundations. But what type of analytic propositions are these? To answer this question we have to see in what way the truth of these propositions is to be justified.

Analytic propositions, which are true in all states of affairs, can be shown to be so by the standard truth table method. The demonstration consists of negating the proposition p and then finding out whether the conjunction of p and not-p is true or false. If this conjunction turns out to be a tautology, i.e. true in all cases of possible combinations of p and not-p, then the analyticity of the proposition in virtue of its logical form alone is proved. How would we justify a proposition such as 'nothing can be blue and red all over at the same time'? One would perhaps approach the issue from the perspective of our conception of surfaces, or perhaps from the perspective of how we attribute properties to surfaces.[5] In either case propositions which can be shown to be true by the truth table method or through analysing our ways of conceiving things, as in the case above, are justified on the basis of reason alone. They are also of the type which are true in all states of affairs.

But consider the totally different type of justification that is involved when we are asked to justify the basic propositions involved in conventional activities, propositions such as 'the chromatic scale is the tempered scale' or 'the metre rod in Paris is one metre long', and other basic definitional propositions of games, rituals or political proceedings. In such cases we do not say that this is the only way human reason can conceive of the state of affairs, as we do in the case of coloured surfaces, nor do we say that the conventions are so because the physical facts require them to be so. That is, we neither say that reason ordains it to be thus, nor do we say that the facts make it impossible to be otherwise. We give an altogether different type of justification. We either say that there is no particular preference between arbitrary choices, that the convention was started for fun or to make life more colourful; or else we give it an utilitarian justification, we attempt to show that such a convention is very (or most) useful. In all such cases the important point is that the justification does not rest on reason alone, appeals to facts or experiences are necessary. Such justifications are a posteriori. Basic propositions of conventions, thus, are analytic a posteriori.

Kant rejected the possibility of analytic a posteriori propositions. He did this because he thought that all analytic propositions are of the same type, they must be justified on the basis of reason alone. He seems to have been led to this belief through acceptance of the Leibnizian contention that all analytic propositions are truths of reason and are thus reducible to propositions of identity by suitable substitutions. Truths of reason are supposed to be true in all states of affairs; such propositions cannot be justified by an appeal to some particular experiences limited only to some states of affairs. Kant therefore assumed that they must be justified on the basis of reason alone, i.e. in an a priori manner. He thus equated analyticity with apriority.

Now there is nothing in the two criteria of analyticity provided by Kant (and mentioned here earlier) which entails either that all analytic propositions are true in all states of affairs or that all of them must be justified in an a priori manner. Since Kant rejected the possibility of analytic a posteriori propositions the belief seems to have been ubiquitously accepted, and it seems to remain so even in contemporary thought. If we do not accept Kant's unwarranted Leibnizian belief that all analytic propositions are truths of reason and are reducible to propositions of identity, then the possibility is left open for analytic propositions which are true in only some states of affairs and whose truth needs to be justified by an appeal to a criterion other than reason. For example propositions such as 'the metre rod in Paris is one metre long' and 'the chromatic scale is a tempered scale' are quite unlike propositions such as 'all bodies are extended' and 'nothing can be blue and green all over at the same time'. While the latter pair can be said to be true in all states of affairs and to be truths of reason in some sense, the former pair of propositions are applicable only within a given context of conventions. The differences, as noted, become evident from the way we justify these propositions.

Writers on Kant's analytic–synthetic distinction seem to infer his views on the topic solely on the basis of the *Critique of Pure Reason*. But while writing this *Critique* Kant had concentrated his attention mainly on the phenomenal realm. Morality, law and all that concerns the noumenal realm, had still to be analysed in detail. In the first *Critique* the noumenal realm remains a vague unintelligible thing-in-itself. By the time of the second *Critique*, the *Critique of Practical Reason*, the noumenal realm becomes the realm of freedom, a moral realm in which noumenal entities, such as human beings, act.Towards the end, that is in *Metaphysik der Sitten*, the noumenal realm takes a concrete and very intelligible form as the legal realm.[6] Now it is very natural that as Kant's view about the practical realm (i.e. the moral, legal realm) develops his ideas about the propositions which apply to the noumenal realm will correspondingly develop. A close study of the second *Critique* and the *Metaphysik der Sitten* indeed shows this to be so. I do not intend to say that his development concerning the propositional theory is always consistent or regular as he continues to theorize about the practical realm, but only that when what he says in these other works is taken into consideration his views on the propositional theory turn out to be far more complex and confusing than would appear on a consideration of the first *Critique* alone. For example in the *Metaphysik der Sitten* Kant tells us:

> All propositions about rights are a priori, for they are laws of reason (*dictamina rationis*). A proposition about rights [or justice] with respect to empirical possession is analytic, for it says no more than follows from the concept of empirical possession by the law of contradiction, namely, that, if I am the holder of a thing (that is, physically connected to it), then anyone who touches it without my consent (for example, wrests an apple

> from my hand) affects and diminishes that which is internally mine (my freedom). Consequently, the maxim of his action stands in direct contradiction to the axiom of justice [rights]. Thus, the proposition concerning empirical possession does not extend beyond the right of a person with respect to himself.[7]

Granted that a proposition that defines the notion of empirical possession is analytic, it is not at all obvious how it can be justified on the basis of reason alone. The very notion of 'empirical possession', i.e. holding on to something by force, requires a knowledge gained through the performance of some actions. Experience is necessary to understand what is 'beyond' myself or others, i.e. what the limits of my body are, beyond which empirical possession does not extend. Propositions defining empirical possession are thus analytic a posteriori. In fact Kant's example above, in which one wrests the apple from someone's hand to verify the truth of the proposition that the apple was in 'empirical possession', makes it very evident that an a posteriori justification is required.

Analytic a posteriori propositions are extremely important when we come to consider activities in the social order where we often have to define new activities and concepts. With regard to the phenomenal realm, i.e. the physical world, the situation is different. We do not define activities for this realm, we discover them. Perhaps Kant's underestimation of the significance of analytic a posteriori propositions has its roots in the fact that he decided his propositional theory in the first *Critique*, prior to an inquiry about the moral and the political realm.

II. ii. (b) *Information Content of Propositions*

Since Kant believed that all analytic propositions are of the type 'all bodies are extended', he was led to the additional belief that all of them must be uninformative. If there are different types of analytic propositions then such a belief is evidently unwarranted. Foundational analytic propositions of conventions are very informative for those wanting to join and participate in the convention. All propositions which inform must after all inform someone, since *informing* is an activity between agents. Hence any talk about the information content of a proposition which does not take the agent's situation into account is meaningless. The degree to which an agent becomes informed by a proposition depends upon how much he knows about the subject or about the convention to which the proposition belongs. For example the now well known proposition in number theory: 'every even number can be expressed as the sum of two prime numbers',[8] may carry little information for those not knowing other propositions about prime numbers, but others who have studied the number theory will recognize that somethng different is being said here. Perhaps this conjecture may turn out to be false, but if true it can inform in a quite different way. Similarly the analytic a posteriori proposition 'Greenwich time is the mean time' is certainly very informative for a person who is learning about the convention of time measurement. The information content of a proposition thus cannot be decided merely by looking at its syntactical or semantical structure.

Once we understand the importance of analytic a posteriori propositions certain basic problems in legal theory can be stated in a simple way.

The central claim of legal positivism, although the positivists have not put it in these terms, amounts to the following contention. In claiming that basic legal propositions are not a priori propositions of reason they have rejected the view that such propositions are analytic a priori, a thesis that they assumed some natural law theories to be asserting. What other options are open then? Legal positivism has evidently not claimed that basic legal propositions are statements about the physical world, i.e. synthetic a posteriori propositions. Their claim amounts to asserting the third alternative, namely that basic legal propositions are analytic a posteriori. This claim asserts that basic rules of recognition etc. are like the proposition 'Greenwich time is the mean time', and these rules have been defined in the way they are by a group of men. Such definitions make certain social activities possible, but there is no necessity for them to be the way they are. We shall see details about the particular claims subsequently.

The belief that basic legal propositions can be defined in any arbitrary way seems to me to be totally false. Legal positivists are no doubt right in pointing out that basic legal propositions are not definitional propositions given a priori by reason, but from this it does not follow that they are given arbitrarily by the will of some people. What follows, I shall attempt to show, is the fourth alternative, namely that basic legal propositions are synthetic propositions given by human reason, they are synthetic a priori propositions.

To establish such a claim it is necessary first to briefly consider the notion of syntheticity and then the notion of necessity.

II. iii. (a) *Synthetic a priori propositions*

Just as there is nothing in the criteria of analyticity to show that all of them must apply to all states of affairs, there is nothing in the criteria of syntheticity to suggest that all of them must be such that they apply to only some states of affairs. Synthetic propositions which apply to all states of affairs, evidently, cannot be justified by an appeal to experience, for all our experiences are limited to only some cases, they cannot guarantee that the propositions will be true for all future cases. Propositions such as 'every event has a cause', 'every deed has a doer' and 'every person is a moral agent' are synthetic propositions which go beyond particular experiences. Such propositions stand in need of a priori justification if they are to be held as true propositions applicable to all relevant cases.

What is actually involved in an a priori justification? There are at least two methods which have been traditionally adopted to assert the truth of such propositions. The first is to claim that they are self-evident, or intuitively known. Such a method evidently does not amount to a justification, it remains a mere dogmatic assertion. The second and the appropriate method to justify synthetic a priori propositions is to give an acceptable transcendental argument in the Kantian sense.[9] A transcendental argument in this sense attempts to show that the truth of a synthetic a priori proposition must necessarily be assumed if the experience relevant to that proposition is to be made at all intelligible or possible. It thus establishes a necessary relationship between the presuppositions of the experience and the experience itself. The arguments show that a connection between the subject concept and the predicate concept must be taken as a necessary condition of their application to any instance of a certain kind of thing or a state of affairs. The necessity in question here is not necessity *simpliciter*, nor is it a logical necessity. It is a necessity that is involved in the application of the concepts.

The notion of synthetic a priori has come under serious criticism following Quine's attack on it in his 'Two Dogmas of Empiricism'. Since I wish to argue that basic legal propositions are synthetic a priori it becomes important to take note of Quine's criticisms. In what follows I shall not attempt to refute Quine's basic assumptions but only attempt to show why his arguments are inconclusive. If his arguments are inconclusive and the notion of synthetic a priori is logically consistent then, for the purposes of this work, we can can continue to employ it fruitfully.

The essence of Quine's criticism can be stated in the following way. Those who have believed in the existence of synthetic a priori propositions have taken them to be unrevisable presuppositions of a system of thoughts or actions, in the sense that the truth of such propositions cannot be given up without jeopardizing the whole scheme. On the basis of his empiricism Quine is led to the view that all propositions are corrigible, and since this is the case there cannot be any synthetic a priori propositions since they are asserted to be unrevisable. It will be important to note how Quine is led to such a view.

Quine elaborates Pierre Duhem's claim that sentences cannot be tested in isolation but only as a part of a system of sentences.[10] Sentences are related to each other. In principle there are no sentences immune to experimental refutation. The principle of empiricism, that all knowledge is justified in terms of experience, is now interpreted by Quine as saying that it is the whole system of our beliefs which has empirical significance and that every sentence within it shares this empirical significance. He tells us:

> The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions re-adjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Re-evaluation of some statements entails re-evaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field. Having re-evaluated one statement we must re-evaluate some others, whether they be statements logically connected with the first or whether they be statements of logical connections themselves. But the total field is so undetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.[11]

Thus according to Quine no sentence can be singled out as being unrevisable, since in the attempt to fit theory to observation any sentence may become a candidate for revision. Logic, mathematics and all other purported a priori knowledge are parts of our systems of beliefs and hence, in principle, totally open to revision.

There are at least three basic problems which make it difficult to accept Quine's thesis that in principle all propositions are open to revision.

The first problem is that Quine's statement is self-stultifying. In asserting that in principle no proposition is unrevisable one has asserted at least one proposition that is unrevisable, namely the proposition in question, that no proposition is unrevisable. Such an assertion raises the traditional problem about propositions which are self-referentially false such as the well-known problems about the 'liar's paradox' and the 'barber's paradox'.[12] Many have argued that there are genuine solutions to these and other similar paradoxes, but the issues can hardly be considered settled.

The second basic problem with Quine's argument is that he does not make it clear in what sense our system of beliefs is being 'transformed' when particular beliefs are changed. If we are to take Quine's analogy of a 'field' seriously, it seems arbitrary to assert that there can be a system or a field under transformation which has no invariant elements or groups. Such an assertion goes at least against the 'fixed point theorem' of mathematics which applies to all systems under continuous transformation and which asserts that in all such systems there must be at least one invariant point with reference to which the transformation can take place.[13] For our system of thoughts one could at least point to the principle of contradiction which will certainly remain invariant under all transformations. It is difficult to see how the principle of contradiction could ever be revised.

However, the most fundamental shortcoming of the Quinean thesis seems to be a third issue. Quine's assumption that all sentences are corrigible rests in the final analysis on a theory of types and a certain notion about what constitutes testing a proposition. He assumes that all sentences within a system can be tested in the same way. But what warrants the thesis that all sentences are tested in the same way? Such a hypothesis could only be accepted if all sentences within the system were of the same type. The belief that a system of propositions such as physics or law is constituted of different types of propositions is not unreasonable. In fact it seems more plausible to believe that the discourse of physics or law is constituted of different types of sentences, some of which express observational data and need to be tested, some of which concern the method to be adopted in testing and accepting or refuting a proposition and some of which are about the method of organizing the tested sentences in correlated ways so as to form a coherent system of beliefs. To assume that all such propositions are corrigible because they can be tested in experience and accepted or refuted on the basis of empirical observations is simply to assert without justification that all the three types of propositions mentioned above are of the same type, namely of the first type. If it be granted that the above three types of propositions have different functions and status in the system, then by simply asserting the empiricist dogma that all knowledge is based on sense perception one has not as yet shown that all propositions are corrigible. All that one has shown is that those propositions whose truth is based on experience are corrigible. This can easily be granted to Quine, but it still remains to be shown that the truth of every proposition is based on observation or sense experience. There are, as Kant and others have argued, propositions whose truth is not based on sense perception, but they are of the type which, when followed, make experiences possible, as for example the proposition 'every event has a cause'. Thus Quine's thesis is true if empiricism is true for all types of propositions, but if there are other types of propositions whose truth must be justified in ways other than by grounding them in sense experience, then his thesis is evidently very limited in scope.

One type of propositions we can be certain are unrevisable: those which make possible or provide the social conditions for the testing of the truth or falsity or the reasonableness of all propositions. These are the basic legal propositions which assert that all scientists, mathematicians, philosophers, and everyone for that matter, must always be given the freedom to find out whether a proposition is corrigible or unrevisable and whether it constitutes knowledge. The basic legal propositions which provide for such freedom are evidently of a different type from those whose truth or falsity or reasonableness is to be tested. Of course the basic legal propositions which provide the freedom for testing can also themselves be tested, but they will be of the type which will turn out to be unrevisable under all conditions of testing. The proposition that we must have freedom to express ourselves is unrevisable because to test its corrigibility we would always need the freedom to express ourselves. As we shall see, there are many other such unrevisable legal propositions.

We see thus that Quine's arguments do not show that there are no synthetic a priori propositions, they only show that propositions whose truth is based on experience are corrigible. The truth of synthetic a priori propositions, as argued, is not based on experience, it is based on the application of reason to possible states of affairs in experience, and hence it requires a transcendental justification.

The notion of a transcendental argument will be explicated further in the next section, where it is applied to some actual legal propositions. Here we are now confronted with the third category of epistemological distinctions, namely the necessary–contingent distinction. Hence it becomes important to discuss this third category briefly if any light is to be thrown on the sense in which basic legal propositions assert a necessity in the application of concepts.

II. iii. (b) *The Necessary–Contingent Distinction*

To start with it is important to distinguish the notion of necessity from that of analyticity and apriority. Necessity is often contrasted with contingency and equated with analyticity or apriority. Tying up these notions in any way requires additional metaphysical assumptions.

In his *De Interpretatione* Aristotle distinguishes between necessity and possibility and between absolute and relative necessity (necessity on assuming a hypothesis). For example the conclusion of an argument may be necessary in relation to the premise or it may merely be possible in relation to it. But in a deductive argument, according to Aristotle, not only is the argument valid, it also proceeds from the premises which are true in themselves. For Aristotle such absolute propositions which are true in themselves are 'essentially true'. This notion is contrasted with what is possible, but not necessarily in an absolute sense. Those which are possible but not necessary are accidental or contingent. In Aristotle's view absolutely necessary truths express insights into the essence of a thing or into the nature of its being. There are analogous senses of 'possible'. In so far as one is concerned with a world in which things are more than their essences one may say that some feature of the things are merely possible (contingent) since those particular features are not entailed by the essences of the things in question. A contingent proposition for Aristotle would hence be one whose truth is not determined simply by the essences of the things about which it is asserted.

The Aristotelian conception of the difference between necessity and contingency thus clearly presupposes a particular metaphysics, namely that the real nature of a thing is its essence. When in the seventeenth and the eighteenth century philosophers such as Leibniz and Hume moved the realm of necessary truths to the relations between ideas or concepts, the propositions opposed to the necessary truths became not those which are merely possible, but contingent truths, i.e. propositions which are not true in themselves. The rejection of the Aristotelian scheme of essences eliminated absolutely necessary truths about the world. Only contingent truths remained. Such truths could then be identified with propositions which describe facts. Similarly since the theory about essences was replaced by a theory about concepts, the necessary relationship between concepts came to be identified with impossibility or absolute possibility. It must be remembered, however, that the essential–contingent distinction is equivalent to the necessary–possible distinction only if the latter terms are taken in their absolute sense. The rejection of essences allowed the opposition of necessary to the contingent *simpliciter*. The next step in characterizing the necessary relationship between concepts as analyticity and subsequently apriority occurs in the works of Leibniz and Kant and becomes explicit in the works of the logical positivists. Such identifications assume that things do not have essences, or at least that we cannot know them. The logical consequence of eliminating essences is to reduce all our knowledge of the world to a knowledge of accidental properties. For the purposes here we need not examine in detail how necessity has been related to other notions and what meanings these relationships have been given. The following table summarizes the main views. In this table the criterion is spelt out in the middle. If a proposition is in accordance with the criterion then it is characterized by the term on the left, if it is not then by the one on the right.

1.	Necessary.	Contradictory is impossible.	Contingent.
2.	Necessary.	Immune from overthrow.	Contingent.

3.	Necessary.	True in all possible worlds.	Contingent.
4.	Necessary.	Is self-evident.	Contingent.
5.	Necessary.	Always true of some objects (*de re* necessity).	Contingent.
6.	Necessary.	Cannot be rationally rejected.	Contingent
7.	Necessary.	Its truth must be assumed to make some experience actual.	Contingent
8.	Necessary.	Its truth must be assumed to make other propositions true (*de dicto* necessity).	Contingent.
9.	Necessary.	Is known with certainty.	Contingent.

The relevant senses of the notion of necessity with which we shall be concerned in this work are senses 5, 6, 7 and 8 only.

The necessity of propositions being true (logical necessity) and the necessity of things having essential properties (metaphysical necessity) are also expressed as *de dicto* and *de re* necessities respectively.[14]

Depending upon one's metaphysical assumptions, one may hold with Aristotle or Kripke and Putnam that synthetic a posteriori propositions, such as 'water is a complex arrangement of H_2O molecules' is *de re*, i.e. an essentially necessary proposition.[15] Or one may hold with Kant that there are necessary synthetic a priori propositions. I shall argue that basic legal propositions are essentially, i.e. *de re*, necessary propositions. The analytic a posteriori propositions of conventions could have been other than they are. We know this because in the final analysis the nature of such propositions depends upon how some people have defined them. Since they or some other people could have defined them differently, such analytic propositions are contingent. Basic legal propositions, however, as I shall attempt to show, are not contingent because they cannot be defined arbitrarily.

Those who have rejected the knowledge of essences have argued that a description of the actual world consists of contingent propositions. If for the moment we even grant that factual discourse is about accidental or contingent properties, it still does not affect the issues concerning legal discourse. All descriptive discourse is not factual discourse. As we have seen, normative discourse concerns the social realm and it too is descriptive. If the facts or the entities in the phenomenal realm do not have essences, does it follow that the 'facts' and the entities of the social realm also do not have essences? To answer this in the affirmative one would have to show that social 'facts' and entities are of the same kind as physical facts and entities. In the absence of any conclusive arguments, eliminating essences from the physical realm does not suffice to eliminate them from the social realm. If normative discourse is different from factual discourse then we may still know the essences of the entities referred to in the normative discourse. At least the mentioned deviation from Aristotle, which makes all discourse about the factual realm contingent, does not by itself make normative discourse contingent. I shall argue that the entities referred to in normative discourse are very different from those of factual discourse.

Before I proceed to provide arguments to show why basic legal propositions are necessary, it will be important and relevant at this point to make a minor deviation in the epistemological inquiry so as to check the veracity and the applicability of the conclusions reached so far. I intend to do this by applying the conclusions to some actual basic legal propositions as found in legal codes. This concrete application will attempt to show how certain basic legal propositions are really synthetic a priori. It will also provide actual transcendental arguments, the nature of which has only been discussed in a theoretical manner so far. The following discussions are also intended to throw more light on the conclusions of this section.

III ILLUSTRATION: THE PROPOSITIONAL FORM AND JUSTIFICATION OF SOME BASIC LEGAL PROPOSITIONS

The heuristic principles of legal discourse consist of basic and consequently derivative legal propositions. The surface grammar and organization of existing legal documents do not at once reveal their deep structure. However, all the necessary heuristic principles must be present in different ways in the legal discourse of every legal system. The clarity in the specification of the heuristic principles depends upon the development and sophistication of the legal system as a whole. As a prelude to a more detailed discussion in the next two sections and as a postscript to illustrate some points in the previous section, I shall presently examine three basic types of legal propositions which are in fact specifications of some of the heuristic principles. The first one concerns the law of citizenship, which is a specification of the heuristic principle concerning class membership in the legal system. The second discussion is about the freedom of expression: the laws with regard to this freedom are particular specifications of the heuristic principles concerning the systematic aims of the system. The third illustration is a discussion of the laws concerning amendments; these are specific instances of the heuristic principle concerning legitimate changes in the system.

III. (a) *Law of Citizenship*

The heuristic principle which defines class membership in a legal system usually distinguishes between citizens, immigrants and visitors. All such persons are members of the legal system in different ways and to different degrees. Membership is automatically granted to those born within the legal jurisdiction, or to those born to the citizens of the legal system. A series of further distinctions then qualifies the law so that it applies to special cases, such as political refugees, visitors, etc. For example Part II Art. 5 of the Indian Constitution states: 'At the commencement of the Constitution all who had domicile in India and: (a) who were born in India; or (b) either of whose parents were born in India; or (c) who had been resident of India for not less than 5 years—are to be considered as citizens of India.' The laws concerning citizenship in other nations are similar. This proposition from the Indian Constitution may be conceived as a particular instance of the more general form of the law of citizenship to which all other particular instances correspond. This may be formulated as:

> *All* persons born in legal jurisdiction X shall be members (citizens) of X. *Some* persons not born in X but domiciled in X shall be members of X under conditions a, b, c...; *some* persons not born in X and not domiciled in X but born to member(s) of X shall be members of X under conditions a, b, c...; some persons not born in X, not domiciled in X and not born to members of X, under conditions a, b, c....

Normally the number of people who fall under 'some' in the above proposition become progressively less as one goes down the list. On an average the majority of people fall under the very first part of the proposition; and they also happen to be born to parents who are already members of X or are domiciled in X. The legal rule is framed keeping this fact in mind. Let us take the basic part of the proposition of class membership: 'all persons born in legal jurisdiction X shall be members of X', for consideration here. What is said about this proposition will apply to its other qualifying propositions too. What is the basic epistemological status of this proposition concerning class membership?

The notion of being born in a particular place or being born to a particular set of parents is evidently not contained in the concept of being a citizen. For from the mere statement that 'P is a citizen of nation N' one cannot deduce about P that he was certainly born in N, or is of parents of N, or that he is domiciled in N. Additional information is required to derive any of these conclusions. Also, the proposition 'P is born in N but is not a legal member of N' is not a self-contradictory proposition. The basic proposition of class membership within a legal system is therefore synthetic. Is it a priori or a posteriori? To answer this one must ask on what basis the proposition 'all persons born in legal jurisdiction X are members of X' is justified? Is there any fact which one can point to that will be a compelling reason to believe in the truth of this proposition? In other words, on the basis of experience, what empirical grounds can one offer for taking all those born within the legal jurisdiction to be citizens? It seems to me that no factual grounds can be offered to justify such a proposition. There is nothing special about the process of being born, or the physiology of the person, or the geography of the place, that can be presented as grounds for accepting a necessary relationship between being born and being a citizen. The law of citizenship cannot be founded on any factual basis for the simple reason that the concept of citizenship is not a factual notion, it is a normative notion, i.e. it belongs to normative discourse. What the law of citizenship establishes is a necessary relationship between the normative notion of citizenship (i.e. of legal membership) and the factual notion of being born in the jurisdiction, or of being domiciled in it, etc. A relationship is established between a normative premsie and a factual premise. Since this proposition is necessary and since factual grounds cannot establish its necessity, it must be established a priori. That is, the basic proposition of the law of citizenship is synthetic a priori. A priori propositions are justified by transcendental arguments. The transcendental argument in this case may take the following form:

> For whatever purpose human beings form a legal community, its formation and continuation can only be actual if it is made possible. The law of citizenship makes possible a legal community which can uphold and continue the application of laws. Since only a community of persons can form a legal system and since a legal system cannot exist without a

> community of persons, all persons born within the community must unconditionally become members of the legal system. The law of citizenship is thus a necessary presupposition of the legal system, the one that makes it possible and actual. It creates the possibility for the existence of a legal system in terms of the members who will be governed by the law and who will formulate the law within the jurisdiction, thus defining and continuing the existence of the legal jurisdictions.

Justifying the basis on which a group or persons should form a community is indeed problematic. Nonetheless it can be said with some certainty that any community that regulates its membership by principles which make it impossible for others to become a member of that community supports an eclecticism which may eventually even amount to racism. The law of citizenship can, thus, never be grounded in a method which makes the selection of new members to the community depend upon the mere opinion of some people in the community. A sure way to overcome the elements of arbitrariness and racism in the selection of new members to the community is to grant citizenship to every person born within the legal jurisdiction. A person who has been granted citizenship in this way has the option to either remain within the community or join some other at a later stage. The choice must finally lie with the person involved. To make this option available to the person it is necessary that, in the first place, citizenship be granted to him by the community in which he was born. To deny citizenship to a person who is born within a particular legal jurisdiction amounts to denying him the possibility of self-defermination and consequently of freedom. The assertion of the Universal Declaration of Human Rights that every person has a *right* to belong to a legal jurisdiction would be vacuous if the determination of citizenship is left to depend totally upon the views and the desires of certain people in the community. If the aim of law is to maximize the possibility for human freedom and well-being, then *jus-sanguinis* and *jus-soli* cannot work in ways which contradict this possibility. The Japanese law of citizenship which does not automatically grant citizenship to all those born within its legal jurisdiction is a case in point.

In defence of the Japanese law of citizenship one may argue that every culture has a right to maintain itself, hence it has a right to select which persons born within its jurisdiction will be its members. This argument is based on a false assumption. It is indeed true that every community has not only a right but also a certain duty to maintain its culture. But from this it does not follow that the culture in that community will be maintained only by those people who are born to parents who belong to that community. The maintenance of culture by a community occurs in complex ways which are not dependent upon which persons are allowed to become legal members of that community. Significant aspects of American culture, for example, have been generated by people of African origin. Numerous Europeans, on the other hand, have not only adapted to North American culture but have also been instrumental in its continuity and development. Similarly one can observe that many people of Asian origin are at the apex of North American and European cultures. It is also important to note in this context that native people within a community have often been instrumental in breaking down the indigenous culture rather than in promoting it. The maintenance and development of culture therefore cannot be by legally delimiting membership to the community. Since it is not necessary that a particular culture can be sustained only by the native population of a community, from the fact that a community has a right to maintain its culture it clearly does not follow that it has any right to select which persons born within the jurisdiction will be its members.

The law of citizenship has a universal aspect to it such that it must operate with the same basic principles in all communities. Only then can it guarantee the possibility of a world community.

The jurisprudential question about how the law of citizenship actually operates in various legal systems and how these need to be developed requires a detailed conceptual and empirical investigation for each legal system. My aim here has only been to show the type of justification that this law requires, in whatever legal system one may consider it.

Let us proceed now to examine the basis of a different type of basic legal proposition.

III. (b) *Freedom of Expression*

The basic heuristic principles which specify the systematic aims of the system are usually mentioned in the Preamble. They may, however, also come under the headings of Fundamental Rights, Basic Law, Constitutional Rights, etc. These specify the systematic aims or ideals that have to be actualized by the legal system. One such specification concerns the freedom that people have to express themselves. What is the propositional status of the proposition that asserts: *everyone has a fundamental right to freedom of expression?*

First, the notion of speaking is not a part of the notion of freedom, and second, the negation of this proposition does not result in a self contradiction. This proposition is therefore not a definitional proposition about freedom or about speech, it is a synthetic proposition. What is asserted in the proposition is a type of necessary connection between freedom and being able to express oneself. This may be interpreted as either that one needs to be free to express oneself or that one becomes free in expressing oneself. In either case the relationship between freedom and expression is in some way still necessary. How is this necessary relationship between the two notions to be justified? It cannot, first of all, be justified by an appeal to physical facts because physical facts reveal only causal relationships. The relationship between freedom and expression asserted here is not causal. It is not being said that freedom is the necessary *cause* of expression: there are many people who are very free but who hardly express themselves. Neither is it being said that expression is the *cause* of freedom: there are many people who express themselves in such abusive ways that they lose their freedom rather than gain or sustain it. Biologically or physiologically nothing shows that there is any sort of necessary relationship between freedom and expression.

Freedom of expression cannot be grounded in any sociological feat such as a convention of speaking freely or having a freedom to so speak. For, first, there have often been conventions to the contrary. This makes it necessary to justify the choice of any particular convention. Second, an appeal to a convention draws our attention only to the fact that some people accept a certain way of behaving. It does not by itself provide any grounds or reasons why the people accept that way of behaving, or why their way should be emulated by others. To justify that everyone has a right to freedom because there is some sort of necessary relationship between being free and expressing oneself one would have to provide reasons that would show why these two notions are related in a necessary way. Since the justification cannot be based on facts or social feats, it must be sought elsewhere. Mere observation of facts and feats cannot provide the required justification, although such observations can certainly be helpful in understanding the actual application of the principle. A transcendental argument which human reason can provide for the synthetic a priori proposition concerning freedom of speech may take the following form:

> Law provides the conditions under which free communication between human beings can continue to exist. Law can continue to exist (be possible) only when free communication between human beings can take place. This is so because adjudication, mediation, arbitration and other legal processes require reasoning to take place between different human beings. Reasoning requires the freedom to consider all possibilities and actualities. Consideration of all possibilities and actualities requires communication, i.e. speech and other modes of expression. Reasoning therefore requires freedom to communicate. Since the legal process involves reasoning it necessarily requires freedom to communicate, i.e. freedom of speech and expression in general. We see therefore that law is possible only when there is freedom of expression, and freedom of expression can only continue to exist when people live by law. The relationship between freedom and expression is thus conceptual, it is not dependent on any factual or social consideration. The relationship is necessary for the very possibility of a legal system.

The basic legal proposition in the above paragraph is the one asserting the fredom of expression. Once this has been established the derivative propositions follow. The derivative propositions are those which are either particular instances of the general term 'to express' or those which are instrumental in achieving this freedom. Thus, speaking is one way of expressing. Publishing, writing letters, using the media (such as radio or television) are other ways of expressing oneself. Hence the particular derivations, such as freedom of speech, freedom of the press, freedom of the media, etc. follows from the general necessity of freedom to express. This basic legal proposition is synthetic a priori.

In fact all basic heuristic legal propositions are synthetic a priori propositions. Being necessary for law, they make law possible. They are justified not by an appeal to any physical or social events but transcendentally, i.e. by showing that they are internally necessary conditions on the basis of which a community can create and sustain a legal system. Such synthetic a priori propositions are not of the kind which are open to Quine's analysis of analytic–synthetic distinction such that they may arbitrarily be analytic at one time and synthetic at another. If they were such propositions they would totally fail in their heuristic function.

I turn now to a discussion of another type of basic legal proposition. These propositions are taken *ad hoc* and at random only to illustrate some basic points made in the last section. A systematic analysis of the heuristic principles of law will be carried out in Part IV.

III. (c) *Laws of Amendment*

Heuristic principles which specify the way in which the system may be changed, if the systematic aims of law are not being achieved, appear in legal discourse most significantly as laws of amendment. Such laws often require a majority of the legal subjects to consent to the change before the laws can be amended. This consent is sometimes taken to be given if a majority of the representatives of the legal subjects, instead of the subjects themselves, consent to the change. In this interpretation often two-thirds of the members of parliament have to give their consent. For example Article 146 of the Constitution of the Soviet Union states: 'Amendments to the Constitution of USSR shall be adopted by a majority of not less than two-thirds of the votes in each of the Chambers of the Supreme Soviet of USSR.' Other constitutions have similar laws requiring a majority vote. Under another interpretation and under different conditions the consent of a majority of the legal subjects is sought directly. In such cases a referendum is held. Fundamental amendments may also be possible by allowing the Supreme Court to bring about the change. Simpler changes in the law, it must be remembered, are often brought about by the lower courts and individual judges in interpreting or extending the law to cover new cases. What is common to all of these kinds of changes, whether secondary or fundamental, is that they are brought about in a *legal way*, i.e. with the use of reason and free consent. Force, fiat or decree are not involved. The distinguishing characteristic of the legal way is that it is always justiciable. It is grounded in the principles of procedural justice. The basic legal proposition which concerns changes in the law can thus be formulated as: *Changes in the law must always be brought about in a legal way, i.e. in a way which does not contradict the principles of procedural justice. Or conversely, only changes brought about in a legal way qualify to be law.* In a subsequent chapter, where I discuss the issue of legal teleology, I shall discuss in detail the problems concerning legal amendment and the basic principles of procedural justice in which the notion of a legal way is grounded. Here it is necessary to ask: what is the propositional status of the above proposition concerning legal amendment?

The notion of amendment is a general notion. Many things and processes are amended. Hence the notion of amendment does not by itself contain the notion of a legal way of changing things. They can be changed in many other ways, such as by force. Moreover the negation of the proposition does not produce a contradiction. Hence the proposition is synthetic.

In what manner is the proposition to be justified? Certainly, bringing changes in the law in a particular manner is not a matter of arbitrary choice as is the case in games. On the other hand there are no factual constraints which make it necessary to follow only a particular method. Nor is it the mere desire to maintain a decorum or convention that justifies the legal way of amendment, for decorum and conventions can be radically different from each other. Ultimately one has to justify the legal way of amending things as being reasonable. That is, one has to show that human reason wants this particular method of amendment even if there are no factual or conventional constraints. A transcendental argument to justify the legal way of bringing about amendements may take the following form:

> It is the business of law to create and maintain a legal community in which individuals can continue to act morally and achieve their moral ends. The procedures which will allow the continuation of legal activities by the individuals are, first, those which will not put an individual out of existence; secondly, those which will not physically restrict his activities; and thirdly those which will not make it impossible for him to exercise his free will. Positively, what they will allow is reasoning, the freedom to obtain the knowledge of all possibilities and actualities, co-operation, and help from others. That is, they will allow only a legal way of acting, a way that does not involve force, violence or arbitrary decree. Changes brought about in a legal way are thus necessary for the very existence and continuation of a legal order. They make a legal system possible.

Basically the above argument asserts a necessary relationship between means and ends, i.e. between procedural justice and substantive justice. I shall discuss this relationship while examining the teleology of law. Here it suffices to note the propositional status of the basic proposition concerning amendments.

Having noted the status of at least three basic types of legal propositions, it will be important now to continue the inquiry further into the nature of basic legal propositions, especially the nature of the necessity asserted by synthetic a priori legal propositions.

IV THE STATUS OF LEGAL ENTITIES

Basic synthetic a priori propositions of law assert a necessary relationship between the legal-subject and the legal-object. For example, as we saw in the last section, a proposition may assert a necessary relation between being born in a particular place and being a citizen, another may assert a necessary relation between freedom and expression, and still another between change and amendment. To explicate the nature of the necessity that is expressed in such propositions we have to know the type of entities that are referred to in these propositions. Different types of entities are related differently. For example the necessary relation that obtains between a triangle and a three-sided figure is logical. Propositions asserting relationships between different types of entities express different necessities.

Traditionally, since Locke, entities have been classfied into two types, the *natural* kinds and the *nominal* kinds. According to Locke, with each meaningful term there is associated some abstract idea that determines what things have a right to be designated by that term. He called this abstract idea the 'nominal' essence of the thing for which the term stands. These nominal essences are of our own making whereas real essences exist in things themselves. The things which have real essences are natural kind objects. According to Locke it is by the nominal essences that we distinguish things into sorts since we can never come to know the real essence of natural things.[16] A recent version of the traditional theory is that of C.I. Lewis.[17] He argues that the description given in connection with natural kinds defines the term, in the sense that anything satisfying the description falls in the extension of the term. Those terms which do not satisfy this condition are about nominal kinds.

Is the natural kind–nominal kind distinction adequate to encompass the characteristics of legal entities? It does not seem to be so. The inadequacy of this distinction becomes obvious if we turn our attention to normative discourse. The natural kind–nominal kind distinction, it must be noted, arose mainly in the context of an analysis concerning discourse about facts. Recent realists such as Kripke, Hilary Putnam and others who also make use of this distinction are again mainly involved with analysing propositions about facts and not about feats.

Entities such as courts, parliaments, citizens, policemen, corporations, criminals, etc. are neither 'natural' like natural kind objects, such as trees and stones, nor are they like nominal kind entities, such as four dimensional cubes. Parliaments, courts, etc. exist objectively; nonetheless they are not tangible like natural kind entities. What sort of entities are they then?

All these separate kinds of entities, it may have been noticed, belong to normative discourse. They are not corporeal objects, but nonetheless they are intelligible as entities. They are *intelligible* to us in terms of the *norms* that describe what it means to be one of these entities and what it is supposed to do. However the main factor that distinguishes entities which belong to normative discourse is that they are not created by individual human beings (in their heads), as imaginary or abstract entities are. They are created socially, i.e. by the co-operation of a number of people willing to abide by certain norms. We have thus at least three distinctions which distinguish entities of normative discourse from natural kind and nominal kind entities:

a) they are not tangible or corporeal objects but they are *intelligible* as entities;
b) such entities do not appear by themselves nor are they created by individual human beings, they are created by prolonged *co-operative social actions*;
c) they are created on the basis of *norms*.

Since the entities defined by these criteria neither describe the natural kinds nor the nominal kinds, it would be best to give them a distinct name. The term *normative kinds* would, I think, describe them best. Legal entities, then, belong to a separate and unique class. One must neither try to reduce them to physical entities nor to abstract nominal entities. Legal entities are normative kinds.

Since normative kinds are created by us, we are in a totally different situation in relation to them than we are in relation to entities not created by us. The basic difference is this: we not only know them by description but also what it means to be such entities, i.e. we know them both descriptively and essentially: For example we not only know what 'lawyer' or 'judge' means through description, we also know what it means to be a lawyer or a judge. Similarly we not only know what a 'faculty' means by description, we also know what it means to be or to constitute a faculty. The same cannot be said of entities that we do not create, such as stones or trees. Although we know what 'stone' or 'tree' means through description or through sense perception, we do not know what it means to be a stone or a tree.

If the essence of the entity described by a norm is known to us, then, clearly, within a normative discourse the intension determines the extension. That is, the intension is necessarily related to the extension.

Since the intension necessarily determines the extension and since we know the extension essentially, it follows that in normative discourse, from the epistemic (i.e. *de dicto*) necessity between concepts one can also legitimately infer the essential (i.e. metaphysical or *de re*) necessity between the entities in the extension. For example if there is a necessary epistemological relationship between being free to express oneself and being able to achieve the legal ends, then the necessary metaphysical relationship follows: it implies that only in a society in which the agents are able to express themselves freely will the legal ends be achieved; also, only an individual who is free to express himself will be able to achieve the legal ends.

Thus, as it turns out, although the necessary relationship in a basic legal proposition is between the concepts, this conceptual necessity does not remain *de dicto* (as may be the case in factual discourse). The conceptual necessity becomes metaphysical since the essences of the normative kinds are known to us.

Basic legal propositions, then, are synthetic a priori, essentially or metaphysically necessary propositions. However, since some synthetic a priori propositions also concern factual discourse, it becomes important to further distinguish those which apply to normative discourse, and consequently to law, from the former type.

V THE NATURE OF BASIC LEGAL PROPOSITIONS

If our relation to normative kinds is fundamentally different from that to natural and nominal kinds, then the propositions which assert necessary relationships between normative kinds must also be radically different from those asserting necessary relationships between natural or nominal kinds. This difference becomes most significant when we consider synthetic a priori propositions. Synthetic a priori propositions which bind normative kinds into necessary relationships must be distinguished from those which bind natural or nominal kinds into such relationships.

Acting in accordance with norms creates normatively possible states of affairs. Entities of normative kinds belong to such possible states of affairs. Normatively possible states of affairs such as political, legal, linguistic, commercial, etc. must be distinguished from factually possible states of affairs such as ecological, biological, physical and other similar states of affairs.

Synthetic a priori propositions, such as 'every event has a cause', provide heuristic principles to organize the facts of factually possible states of affairs. Or, as Kant argued, such propositions inform our understanding and make the world intelligible. The synthetic a priori propositions which belong to normatively possible states of affairs, however, function in a very different way. Such propositions not only inform and organize our knowledge of the world, they actually organize and give a structure to normatively possible states of affairs. That is, they literally 'in-form', i.e. give a form, to some states of affairs. The fact that they function in this unique way follows directly from the nature of the necessity involved in such propositions. It was noted earlier that synthetic a priori propositions which apply to the normative kinds assert not only an epistemological necessity but also a metaphysical necessity. Since such propositions express a metaphyscial necessity, when it comes to informing or organizing normatively possible states of affairs they not only inform and organize our knowledge about them but also inform and organize the world essentially, i.e. actually.

Since synthetic a priori propositions, which apply to normatively possible states of affairs, function in a different way from propositions such as 'every event has a cause', it would be best to distinguish between these two types of propositions by defining the former type as *normatively synthetic a priori propositions* and the latter type as *factually synthetic a priori propositions*.

The view presented here differs from that of Kant in so far as it makes a distinction between different types of synthetic a priori propositions, but it is similar to his view in that Kant too believed that the basic propositions of law and morality are synthetic a priori. The difference, however, lies in the fact that since, according to the arguments here, synthetic a priori propositions of reason give metaphysical from to the social order, they not only become regulative rules of reason but also constitutive principles of the social realm. Kant believed that synthetic a priori propositions which belong to moral and legal discourse only regulate our knowledge of the moral realm.

The substantive issues about how synthetic a priori propositions function differently in the social realm can be considered in detail only after the notion of a 'realm' has been clarified to some extent. In the first section of the next part I intend to explore in some detail the notion of the realm in which law exists. Here it is important to draw the relevant conclusions that emerge from the final decision that basic legal propositions are normatively synthetic a priori *de re* necessary propositions.

The first significant consequence is that such propositions cannot be justified to be true propositions of law by an appeal to experience. That is, their truth conditions cannot be dependent on human will alone. Such propositions are not true because they are the commands of any person or persons. Nor are they true because manyor all persons have given their consent to make them so. Human will is involved only instrumentally with basic legal propositions. We will and consent that they be applied because they are true propositions of law. The truth of the propositions does not follow from our activities. We are motivated to carry out the activities proposed by basic legal propositions because of their a priori truths.

The second important conclusion is that basic legal propositions are not propositions of natural law in the sense that they are not propositions about nature; nor do they derive their justification from states of affairs in nature. Discussions about nature seem to be discussions about factually possible states of affairs, but normatively possible states of affairs, as we have seen, do not involve a discourse of this type. Propositions about nature, in the strictest sense, would be synthetic a posteriori propositions; and propositions which organize our knowledge about nature would be synthetic a priori propositions; but basic legal propositions are like neither of these. This brings me to the third important conclusion.

If the truth of basic legal propositions is not dependent on human will could one say, as it has been said sometimes, that it is dependent on human reason? There are some very important qualifications which need to be kept in mind if one wishes to characterize them in this way. First, they are not just truths of reason but truths of reason in application to normatively possible states of affairs. This makes them very different from propositions of logic or mathematics which too are claimed to be truths of reason. Basic logical or mathematical propositions, which are sometimes rightly called *the laws of thought*, are often claimed to be eternally true, whether the human mind discovers them or not. Basic legal propositions, however, are not eternally true in this sense. Since they have to be used to create and sustain normatively possible states of affairs they become true (i.e. come to exist) only when there actually exists a social realm created and sustained on the basis of such propositions. In contrast to the laws of thought basic legal propositions are *the laws of practice*, i.e. laws by which the human will or inclination is determined through reason in practice. Laws of thought, in so far as thought applies to all states of affairs, naturally concern both factually and normatively possible states of affairs. But laws of practice concern only normatively possible states of affairs.

The view that basic legal propositions are propositions of natural law, in the sense that they are about factually possible states of affairs, can have immoral implications. When it comes to natural laws such as the law of gravity we do not have a choice in following or disobeying them, but we always have the choice of either following or not following the laws of normatively possible states of affairs. By not following them we will of course not be participating in or creating that normatively possible state of affairs, but then the ultimate choice is ours. The traditional natural law propositions, I think, intend to say: 'this is how things are'. If basic legal propositions were of this sort then, first, there would be no moral necessity to follow them, we would be doing this without choice. However the second danger is more significant, for such a belief could lead to use of force by some people against others to make them behave as they 'naturally' should. That is, instead of leading to freedom such a belief could lead to compulsion on the grounds that human nature or the world naturally ordains people to behave in a particular way. Basic legal propositions, as we shall see, are not the type which allow use of such compulsion or force.

Since basic legal propositions are not about nature it is inappropriate to call them propositions of natural law. One may, if one wishes, use the term 'natural' in a metaphorical sense, in the sense of 'internal'. In such a sense, when basic legal propositions are natural to law, they are internally true to it.

On the basis of the conclusions about the nature of basic legal propositions I shall now proceed to analyse the *substantive* claims of some important legal theories. This discussion will show why Part IV of this work is necessary.

REVIEW AND CONCLUSIONS III

THE BASIC SHORTCOMINGS OF TRADITIONAL LEGAL THEORIES

The different conditions that a legal theory is required to satisfy were noted at the end of Part II. In Part III the status and functions of different types of propositions were discussed. Let us now proceed to see how different legal theories have attempted to satisfy these requirements and what sorts of propositions they have appealed to to fulfil their task.

Typically, philosophers have responded in three different ways. In the first response they have supposed that the requirements which make a normative system a legal system could be met by the commands of some authority. In their legal theories they have accordingly attempted to spell out the conditions in which the commands of the authority could determine the validity and the existence of law. In the second response theorists have asserted that the specific conditions are met by a rule or some rules of recognition which simply give the desired limits for the validity and the existence of law. In the third response they have argued that the requirements are met by a basic norm which constrains the system but is not itself derivable from a more basic rule. Let us examine each of these types of responses in detail.

The first type of response is to be found in the legal theory of John Austin. In it, legal systems are characterized in terms of second order rules such as rules of individuation, classification and correlation which derive their ultimate legitimacy from a higher order basic legal proposition which asserts that the lower order legal propositions are nothing but the decree of a sovereign authority. Such an authority expresses its will, signifies its desire and backs up both by a threat sufficiently effective to compel obedience.[1]

Austin's notion of the way people are obliged to obey the law has been analysed by Hart in terms of the way people are compelled to do different actions. A man with a gun, for example, can compel people to do something. Law too obliges people to perform some actions. But as Hart has pointed out there is an important difference in the way people are obliged. In the gunman situation people are commanded to do something by use of force, but in the other case it is their general obligation to obey the law that compels them to perform some actions. Thus Austin, according to Hart, confuses having a duty to obey the law with being obliged to obey it in the sense of being forced to obey it.[2] But is Hart's analysis itself successful in showing what sort of obligation people have to obey the law if it is not a fear of threat or force that will be used against them? To answer this question we must first take a closer look at Austin's error.

At a deeper level Austin's analysis confuses the obligation to obey the law with the obligation to accept rules which legitimize the law making agency. Austin of course realizes that there must be rules which determine who is and who is not a member of the sovereign (the law making body), but he does not give an account of why we should accept the rules which say that the law making agency is to be accepted or obeyed. He tells us that such a question is simply beyond the province of law. If for the moment we do grant that the answer to such a question is beyond the province of law, it certainly does not follow that it is beyond the province of legal theory. In his *The Province of Jurisprudence Determined* Austin was not presenting primary legal propositions, but a legal theory. If a legal theory cannot tell us why we must accept rules which assert that a particular agency is to be accepted as a law making agency, then what theory can?

Rules which tell us why the law making agency is to be accepted must be conceptually prior to the agency itself. They cannot therefore themselves be the command of the sovereign. The proposition that 'law is the command of the sovereign' is an analytic proposition, or at least intended to be so. For law in this case is *defined* to be the command of the sovereign; they are one and the same thing; i.e. law is the command of the sovereign and the command of the sovereign is law. However although this proposition is analytic Austin did not evidently intend it to be a priori. He did not, for example, hold that this proposition would seem to be a self-evident proposition or that it would be justified by the way we use language. He would I think assert that this is how law *in fact works*, that one has to actually *observe* how the decree of the sovereign becomes law to verify the truth of the proposition. In short the acceptance of this proposition to be a true proposition about law would require some sort of a posteriori justification.

In the absence of a justification which tells us why the law making agency must be accepted, Austin's insistence simply that the sovereign's commands comprise the law and that these laws must be obeyed[3] eventually amounts to propounding a dogmatic theory which, in its most essential aspects, is indistinguishable from a justification of the use of force by some people on others. Basic analytic a posteriori propositions, as we have seen, are not basic propositions of law. They are propositions on the basis of which conventions, fashions, styles, games, etc. are created and sustained. An argument which allows for the use of force in a system founded on an analytic a posteriori proposition is then nothing but a justification of a convention in which some people can arbitrarily use force on others, i.e. it is a justification of martial law, dictatorship and other similar coercive systems.

The best exponent of the second type of response to the requirements of a legal theory has been Hart. Hart presents a theory in terms of primary rules which oblige people to obey and secondary rules which confer power and legitimize the law making agency. The secondary rules, which are rules of recognition, change, and adjudication are, according to Hart, 'matters of fact'.[4]

We have already seen that in so far as the property of having primary and secondary rules is concerned, it does not characterize legal systems, but normative systems in general. Such characterizations therefore do not distinguish law from other normative systems. It is their property of being a 'matter of fact' that needs to be examined.

By making the basic rules of recognition simply 'matters of fact' Hart does not permit us to distinguish between the reasons why people should obey the law and the reasons why they actually obey it. In the strict sense, as we have seen, matters of fact are expressed as synthetic a posteriori propositions. The question of obeying or not obeying the dictates expressed in such propositions just does not arise, we have no choice in the matter. The proposition that 'a man's heart beats about seventy-two times a minute on the average under non-active conditions' is a synthetic a posteriori matter of fact proposition. This proposition is a general rule which a doctor uses to check the health of a person. Can it be said that when my heart beats seventy-two times I am *obeying* this rule? In checking my pulse is the doctor checking whether or not I am being obedient in following a rule? Evidently not. The question of obeying or following a rule which is a matter of fact does not arise, activities just happen in accordance with such rules. Thus, when Hart says that the basic rules of recognition are matters of fact he obviously cannot mean that they are synthetic a posteriori propositions. In England, Hart tells us, the basic rule of recognition is 'What the Queen in Parliament enacts is law.'[5] What sort of 'matter of fact' does this proposition describe? Clearly it does not describe a fact of nature or of the physical world. As suggested before, perhaps Hart means it describes something true in a society and is hence, in some derivative sense, a social 'fact'; but even in this sense it is hard to see how it can be a matter of 'fact', for there is no feat which actually corresponds to this proposition. The proposition, thus, does not describe any 'matter of fact' in either a literal or derivative sense. It is a proposition asserting a norm, i.e. it is a norm applying to the normatively possible state of affairs. One must ask then why Hart insists on calling it a 'matter of fact'? The obvious result of making the basic rule of recognition a matter of fact is to suggest that it is a synthetic a posteriori proposition, and like synthetic a posteriori factual propositions (such as the law of gravity) it must be accepted that this is how the world is, there is nothing we can do to change it. It is also to imply that the question of moral appraisal does not apply to the basic legal supposition since matters of fact, as we know, are not open to such criticisms.

However Hart does not believe that law is not open to moral appraisal, although his characterization of the basic rules of recognition implies this. Since he allows them to be morally appraised we must take the basic rules of recognition that he mentions to be analytic a posteriori, and not a synthetic a posteriori matter of fact. Analytic a posteriori propositions, as noted, are propositions defined by human beings to be so for particular practical purposes. They are not like factual propositions that we discover. If Hart accepts the analytic a posteriori proposition 'What the Queen in Parliament enacts is law' to be the basic rule of recognition, how is it any different from Austin's claim that the basic rule of recognition is 'What the sovereign commands is law'? The Queen in Parliament is after all supposed to be the sovereign. The central difference, as it seems to emerge from his analysis, is this: unlike Austin, Hart does not believe that everyone in England has to believe in the truth of the proposition that the law in England is what the Queen in Parliament enacts. Only some of them have to believe in the truth of this proposition, namely the officials involved in applying the law. The rule on the basis of which the validity of law is recognized, Hart tells us, concerns only the officials, only they have to take an 'internal' point of view with regard to such rules. To take an 'internal' point of view is to accept the proposition to be binding on one's behaviour. It is not to take an 'external', i.e. an outsider's point of view from which one only describes what the rules are but is not oneself bound by them. According to Hart, one who takes an internal point of view with regard to the proposition 'What the Queen in Parliament enacts is law' would have to take this proposition to be a true proposition for English law.[6]

If only the officials have a criterion for recognizing what rules are to count as laws, then what about the general public? How does it recognize the valid laws of the land? If the question 'what are to count as first order legal propositions?' is answered by 'whatever the officials recognize them to be on the basis of some rule of recognition which they themselves have made or accepted', then this amounts first to asserting that law is whatever the officials declare it to be and second that the general public has no way of independently recognizing what is to count as the law of the land. If the general public has no independent way of recognizing what is to count as valid laws in the jurisdiction, does it follow that officials can declare any proposition to be a law?

Hart is not unaware of this difficulty and he does suggest that the officials who are authorized to make such rules must give them a content which does not stray too far from the 'core sense' of the natural law thesis. He thinks that there is a 'necessary-contingent' relationship between the 'core sense' of natural law propositions and the validity of the positively declared laws.[7] But if in fact the ultimate rule of recognition is simply a 'matter of fact' (whether we interpret it as a synthetic a posteriori proposition or an analytic a posteriori proposition), how can we explain this 'contingent-necessary' relationship in a way which obliges the officials concerned to accept *any* restriction on the content of their rules? If there is no restriction on what can be accepted as a rule of recognition then, at the ultimate level, there is no restriction on what can be declared law. The difference between a legal system and a system by fiat thus eventually becomes impossible to sustain within such a conceptual scheme, although legal practice at levels other than the basic one could be shown to be different from despotic practice. In a despotic or a dictatorial political system the dictator dictates what is to be the rule of recognition and he enforces it on the people. If there is no way of distinguishing between the rule of recognition that the dictator enforces and the rule of recognition on the basis of which a proposition is recognized as legitimate law, then there can be no way of distinguishing between an arbitrary political system and a social system in which the people live by the rule of law. Hart's analysis of the system of rules thus eventually amounts to the assertion that we cannot distinguish between arbitrary rules of recognition set by dictators and the rules of recognition involved in legal systems. Such a thesis, as I shall argue in the next part of this work, is fundamentally mistaken. We can not only distinguish between arbitrary political systems and legal systems but also between different types of rules of recognition, even at the ultimate level. Not every arbitrary rule can be classified as a rule of recognition of law.

We see thus that both Austin and Hart finally fail to distinguish the concept of law, first, from the concept of normative systems in general and, second, from the concept of those normative systems which sanction the use of force and compulsion.

Since Hart's analysis is unable to distinguish between different types of normative systems which employ force it is finally unable to tell us in what sense of 'obliged' we are obliged to follow the law. Eventually the reason why we have to do our legal 'duty' turns out to be to avoid being forced by someone to do so. But such a compulsion to do one's 'duty' is also the one that obtains in a dictatorial system or under martial law. Hart's analysis, therefore, is unable to bring out how the compulsion involved in a legal system is any different from the compulsion in a gunman situation. If both are finally based on a threat of punishment and physical and mental pain, then they both finally compel us in the same way. Moreover since Hart allows the totalitarian system set up by a dictator to be just as 'legal' as any other legal system he even legitimizes the gunman method, for a dictator is nothing but a gunman at large. He operates on the same principles and in the same way as a gunman, the only difference being that a gunman may compel an individual while the dictator uses a group of people to compel many.

In all its essential aspects then, Hart's theory is not very different from that of Austin's. The aspects that he presents as different are in fact those aspects which belong to the concept of an open normative system, not to the idea of law. Hart in fact presents a variation on the Austinian theme, in which not all citizens but only the officials of the legal system have a duty to take the dictates of the sovereign as binding. But why must the officials take such an internal attitude towards the dictates of the sovereign? Hart does not explain this. Perhaps, as Golding has pointed out, the officials have a mechanical habit of obedience.[8]

The fact that Hart has not moved away from the basic Austinian assumptions becomes evident if one considers even the language in terms of which he poses the basic questions of legal theory. The question about whether or not there is any necessity to follow the rules set up by the legal authorities is misleadingly asked as: is there an obligation to *obey* the law? If law is not a command, where does the question of obeying it or not obeying it arise? The requirement of *obedience* is necessary only for commands and orders. The language game of 'obedience', as the Wittgensteinians would explain it, is intelligible only in a form of life in which orders and commands are issued. In following a legal rule one is only acting in accordance with the principles proposed by a legitimate group of people. To assert that in doing so one is *obeying* these people an additional theory is being tacitly asserted.

In conclusion then, the central source of confusion in Austin's legal theory and in Hart's version of his theory lies in the fact that they base their systems on analytical a posteriori propositions which can be defined in any way depending on the will of different persons. Basic legal propositions, it has been argued, are necessary propositions, they cannot be defined in any arbitrary way. The necessity is not grounded in the fact that someone wants them to be so, but in the very possibility of an application of certain necessary propositions to society. A discussion of their substantive nature must, however, wait until we have examined the following alternative responses to the requirements of a legal theory.

The third type of response—a system of rules based on rules—is found in Kelsen's work. According to Kelsen a legal system is comprised of a hierarchy of norms. The validity of one norm is determined by reference to another norm, one higher in the system. At the base of the system is the *grundnorm*, the basic norm which validates and legitimizes *all* other norms and law making agencies.

Now we have already seen that the property of having a hierarchy of norms is not unique to law, many social organizations function in the same way. The validation of the basic first order rules in every normatively possible state of affairs is done on the basis of more basic rules of recognition, adjudication, and other power-conferring rules. The characterization that in a normative system the lower rules are validated by the higher or more basic rule is not enough to distinguish law; more needs to be said to specify that hierarchy of norms which can be called uniquely legal. Has Kelsen been able to distinguish law from other such structurally similar normative systems?

Kelsen declares that 'all law is positive law' by which he means that all laws are created and annulled by the act of will, but he recognizes that the basic or the *grundnorm* can scarcely be a positive law in the same sense; it is unique.[9] What sort of uniqueness is this?

It has often been claimed that in characterizing the uniqueness of the basic proposition of law Kelsen is presenting a Kantian view; Kelsen himself claims this.[10] Whether or not this is really so requires a closer look at the arguments. Kelsen tells us:

> In so far as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm that one ought to behave as the constitution prescribes, that is, one ought to behave in accordance with the subjective meaning of the consitution-creating act of will—according to the prescriptions of the authority creating the constitution.[11]

The question posed is indeed Kantian and I think Kelsen is certainly right in attempting to establish the possibility of a legal science without recourse to meta-legal authorities, but is the answer provided Kantian? Is this what Kant meant by a 'transcendental presupposition'? Kelsen tells us that the basic *grundnorm* of law is a 'transcendental-logical presupposition', but in what sense of 'transcendental' is the proposition 'one ought to behave as the constitution prescribes', or, as Kelsen reformulates it '[one ought to behave] according to the prescriptions of the authority creating the constitution'—a transcendental proposition? Clearly if the basic norm is a 'constitution-creating *act of will*' then it cannot be a transcendental presupposition, at least not in the Kantian sense, for propositions whose truth or existence depends upon acts of will are not transcendental propositions for Kant. Only propositions given a priori by *reason*, whose truth requires a transcendental justification, qualify to be transcendental presuppositions.[12] Hence either Kelsen's argument represents a misunderstanding of Kantian philosophy or else he is using the terms 'transcendental' and 'presuppositions' in a sense not explained in the context. Perhaps Kelsen is led to characterize the basic proposition that he mentions as 'transcendental' due to the mere fact that it makes something possible. If so, the sense in which different propositions make different things possible must be clearly distinguished. Many propositions make an event or a possible state of affairs physically, i.e. materially, possible, but this property alone does not make the proposition a transcendental presupposition; the proposition could be a definitional proposition which defines the convention to be followed, or it could be a permission or a decree which makes possible some acts or events. The principle mentioned by Kelsen here is a proposition which allows for the material possibility of a normative system.

To illustrate this point it will be helpful to consider other similar propositions. The proposition that 'one ought to behave according to the prescriptions of the authority creating the constitution of the Canadian Philosophical Association' makes this Association possible; similarly, 'one ought to behave according to the constitution of the Rotary Club' makes the Club possible; or, 'one ought to behave according to the prescriptions of the authority creating the rules [constitution] of hockey' makes the game of hockey possible. If the proposition presented by Kelsen is a transcendental presupposition of law, then so is the last one a transcendental presupposition of hockey! It is evidently not such a presupposition for the basic reason that we do not derive the truths of the propositions which create hockey or the Rotary Club from reason but from empirical evidence.

It must be noted that I am not asserting that the transcendental presuppositions of legal science do not exist or must not be sought. In fact a significant portion of the inquiry in this enterprise is going to be devoted to precisely that task. What I am attempting to show is that the proposition asserted by Kelsen to be the basic proposition of law neither belongs to law alone nor is transcendental. We shall see in the next part what transcendental presuppositions are, and which of these qualify as those that belong to law.

These illustrations bring out two points. First that Kelsen is only dealing with a material possibility or state of affairs, and second that the *grundnorm* he presents is not a basic norm of law but a basic norm which must be presupposed for the material possibility of any normatively possible state of affairs which is *constituted* by norms. Moreover he is not presenting a view based on Kantian epistemology, as is often alleged.

Kelsen thus fails to show us what is unique about his basic norm. If it is an *act of will*, as he suggests, then it is not clear how it is any different from other positive laws. If it is not an act of will, it is equally unclear in what sense it is transcendental and in what way it applies to law alone.

As we have seen, propositions of law neither have the form 'X ought to be done' nor do they prescribe anything, they only describe possible states of affairs. Hence, even on grammatical grounds Kelsen's *grundnorm* cannot be a proposition of law. One may perhaps give it a descriptive form, such as 'behaviour in accordance with the prescriptions of the authority creating the constitution is necessary', but this does not solve the problem, for it is true for all normatively constituted systems, whether they be clubs, games, associations or unions.

Kelsen's account of the *grundnorm* seems to be too sketchy to enable a decision about what epistemological status it should be accorded. Besides the misleading assertion that it is a transcendental presupposition, Kelsen does not elaborate on the nature of the proposition or the nature of the relationship between the concepts obtaining in it. However for our purposes it is enough to clearly see what the proposition is not. The *grundnorm* is not a synthetic a priori proposition, for its justification is neither based on reason nor is transcendental. Moreover it applies to many normative systems and hence is not a basic legal proposition.

Since Kelsen's *grundnorm* applies to many normative systems and since some of these normative systems permit the use of force, we are once again confronted with the problem faced earlier with Hart's account of the basic propositions. How do we distinguish between those *grundnorms* which are at the base of normative systems which employ force arbitrarily and those which use it in a legitimate way? The distinction between arbitrary normative systems in which force is employed by the mere will of a few people and those normative systems in which force or compulsion is used justly cannot be made in terms of the criteria that Kelsen provides. His analysis, like that of Hart, is finally unable to distinguish between a system by law and a system by fiat, force or decree. The criteria and definitions that they provide apply to many systems, including the one set up by a despotic, dictatorial or totalitarian government. The central shortcoming in both their analyses is that having identified some necessary conditions for a normative system they arbitrarily terminate their inquiry, having assumed that the legal system has been distinguished from amongst various normative systems. Just as in Hart's case one has to ask what distinguishes a rule of recognition for law from other sorts of rule of recognition, in Kelsen's case, when he says the *grundnorm* is 'one ought to behave according to the prescription of the authority creating the constitution', one must ask when or under what conditions the prescriptions of the authority creating a constitution provide a system of rules for a legal way of ordering and running society. Or more simply, under what conditions does the authority create a constitution for law? What this question demands on the one hand is a criterion for distinguishing between a constitution set up by a dictator and a constitution acceptable as a legal code set up according to the rules of law. On the other hand the question demands a criterion or criteria for distinguishing between a legal constitution and a non-legal constitution (such as those of clubs). In short the question requires one to specify the unique legal *grundnorm* and the hierarchy of norms that belong to law. Although Kelsen talks in Kantian terms, the fact that he is eventually giving us another variation of the Austinian command theory becomes very evident in crucial passages such as this:

> The function of this basic norm is to found the objective validity of a positive legal order, that is, to interpret the *subjective* meaning of the acts of human beings by which the norms of an effective coercive order are created, as their *objective* meaning. The foundation of the validity of a positive norm, that is, one established by an act of will and prescribing a certain behaviour, is the result of a syllogistic procedure. In this syllogism, the major premise is the assertion about a norm regarded as objectively valid, according to which one ought to *obey the commands of a certain person*, that is, one ought to behave according to the subjective meaning of these *commands*; the minor premise *is the assertion of the fact that this person has commanded* to behave in a certain way; and the conclusion is the assertion of the validity of the norm: that one ought to behave in this particular way. Thus the norm whose validity is stated in the major premise *legitimizes* the subjective meaning of *the command*, whose existence is asserted in the minor premise, as the *command's* objective meaning.[13]

These remarks make it clear that Kelsen believes that the transcendental presupposition is after all nothing but a command that a person or a group issues to others. But this is exactly what happens in a dictatorial system.

The fact that Kelsen is actually presenting a type of command theory of law becomes most evident from his treatment of the notion of delict. This notion has a central place in Kelsen's legal theory. Delict according to Kelsen is not the negation but the *condition* of the law. What this implies is that law does not come into existence until someone first commits a delict.

Any theory about delict must pay attention to two closely related questions about this notion. The question about the conditions under which a delict can *exist* and the question about the conditions under which we can *recognize* that a delict has occurred. The two conditions are not necessarily the same. Slavery as a delict existed long before it was recognized to be so. Similarly the wrongs done by assuming an inferior status for women have existed for a long time, but only now are they coming to be publicly recognized. If the conditions under which a delict exists are different from the conditions under which we recognize them, then Kelsen's statement that delict is the condition for the existence of law is grossly misleading. The confusion between the two conditions can be said to permeate legal positivism in general. Kelsen's analysis no doubt throws light on the truth condition of delict; namely that it must be recognized to be so by the authorities concerned. But the recognition of the violation of a rule is one thing and the conditions for the existence of the rule that have been violated another. It is true that we recognize that a law has been broken when a delict is committed, but this presupposes that the law existed prior to the delict, only then can it be recognized to have been broken. If this is not so then we will have no grounds to classify any deed as a delict.

Delict can thus never be the condition for the existence of a law. It can only be the condition for our coming to know the fact that someone has violated an existing law. The existing laws pertaining to specific cases is often known. But sometimes judges and lawyers have to investigate and find out what has been accepted as law by society in its conventions or in its tradition. Sometimes they may even have to find out what ought to be the law in keeping with the general legal practice followed by that society.

The fact that delict is not the condition for the existence of law becomes easier to grasp if we turn our attention to the sphere of private and civil laws. These branches of law, of course, have their own counterpart to the notion of delict, such as the notion of a breach of contract. However what distinguishes them is the fact that they have evolved differently from public laws. The laws concerning marriage, for example, have existed because people have wanted theit marriages to be socially recognized and not because someone has committed a delict. Similarly the laws concerning contracts have come into existence because people have been wanting to exchange goods and labour in an orderly and predictable manner. The breach of contract comes to be recognized as a wrong only since the laws of contract are already in operation. Even in the area of public laws one may consider administrative laws or the laws concerning elections. These laws, evidently, do not exist because someone has done some wrong, but on the contrary because someone or many people want to act rightly. The laws facilitate order and ease.

The practical consequence of Kelsen's notion that the delict is the condition for the existence of law is that whatever the police punishes must be taken as legally wrong. Coercion through police power is supposed to be used only when a delict has occurred; if one makes delict a condition for law then one makes the use of police power the condition for the existence of law. On such a view illegal actions or even general misbehaviour of the police can never be questioned, nor can they be punished. To hold such a view is to turn a blind eye to the atrocities perpetuated by the police in many societies. The history of the misuse of police power in subject countries as well as in independent nations should be enough to deter anybody from agreeing with Kelsen that law exists *only* because coercion can be used against delict.

It is natural to ask at this stage that if delict is not accepted as the condition due to which a law comes into existence, in what factors must one seek the grounds for its existence? At the outset it can be simply said that the general willingness of human beings to act rationally and purposively in accordance with their moral precepts is the basic condition for the existence of laws. This general remark, of course, needs to be explicated and justified. A discussion of this issue is the main concern of Part IV. The existence of a law requires a complex state of affairs. Many conditions need to be fulfilled.

Although Kelsen does not seem to have succeeded in characterizing law in its most essential aspects, his insistence that natural law theories can be misleading and confusing since they interpret 'nature' in so many different ways is not out of place.[14] These remarks seem to me to be essentially correct.

In its methodology a natural law theory has a basic similarity to Kelsen's theory. It too attempts to establish the validity of the first order legislated norms in some basic third order rules about rules. Such legislated norms are supposed to be derivable from the basic legal rules and are in conformity with them. However, as Kelsen has noted, the basic rules of natural law theories are very different from those of his theory for the reason that these natural law theories seek to establish the validity of law by an appeal to an extra-legal authority such as God. The problem with such theories, however, is not only the one that Kelsen has noted, namely that the existence of God is debatable. There is a deeper problem which becomes explicit when one considers the issue from a secular perspective. Even if one grants that law is based on the authority of God and that God does exist, the question arises: what sort of God? People in different religions have understood the concept of God in very different ways and live their lives in accordance with these percepts in significantly different ways. Hence any legal theory which bases itself on a particular notion of God, and which does not allow or tolerate different interpretations of the notion of God as found in different religions, faces from the very beginning the problem of being inapplicable to a society in which differences in religious views are accepted. Since law is universal in application it cannot be based on concepts or practices which are intelligible or available to only one particular religious community. A basic legal proposition asserts that there must be freedom of worship and religious belief, or at least that there must be freedom to discover the nature of God. If this legal claim is to be sustained one cannot start by first making it necessary that a certain idea of God be accepted. Law must provide the conditions under which each person is free to discover the meaning of the concept of God. It cannot itself make these ultimate decisions in advance for all men. A normative system which does make these ultimate decisions for an individual would be a religious system of norms and not a legal system.

Consequently the basic problem with theistic natural law theories is the description that they give of the ultimate being and of man's relation to that being. A legal system must allow everyone the ultimate freedom to seek out the relationship that may obtain between man and the ultimate being, whatever that may turn out to be. Law cannot be founded on a set of beliefs which dictates only one particular description of God or his relationship to man, whether that set of beliefs is provided by a philosopher or a prophet.

By insisting that a legal system cannot be based on a set of beliefs which, directly or by implication, limits inquiries into the ultimate nature and purpose of man and the world, I do not intend to imply that a legal theory is not finally grounded in some basic beliefs. My insistence is only that such basic and ultimate beliefs cannot be the *limiting* kind. That is, they cannot be the kind of beliefs that tell one that all inquiries into the ultimate nature and purposes of man except the one dictated by the system are wrong or false or undesirable.

We see thus that whereas legal positivism fails to provide us with criteria in terms of which a legal system can be distinguished from an arbitrary political system, natural law theories fail to provide us with criteria in terms of which a legal system can be distinguished from exclusive religious systems. What we need is a legal theory which can distinguish a legal system from both these types of normative systems. The distinctions between the various systems that I have outlined here are of course only preliminary ones. The task of distinguishing the legal system from political, religious and all other related systems forms the major theme of my enterprise in the next part.

However before I proceed to this task a close scrutiny of the essential aspects of another theory will be relevant here, especially because it is sometimes assumed that this theory provides a middle ground between legal positivism and natural law theories. Such a middle position is sometimes taken to be presented by Ronald Dworkin's arguments.

Dworkin has not provided us any systematic or detailed theory of law, but from his criticisms of the legal theories of Hart and others and from his discussions about the notion of rights one may, I think, legitimately make the following conclusions.

The essence of Dworkin's theory is that in its most general features law is ultimately controlled by a set of *principles* which one may find entrenched in the jurisdictional community. Such principles are not arbitrary in the way the positivists think the basic rules of law are, but, according to Dworkin, neither are they principles of nature of the type suggested by natural law theories.

If it be granted that Dworkin is essentially right in claiming that law is eventually controlled by some basic principles entrenched in the community and that such principles need not necessarily be the ones legislated by the authorities, the next question that naturally arises is regarding the status of such principles. Dworkin, evidently, does not suggest that these principles are a priori propositions. He seems to tell us that it is simply a matter of fact that these principles are entrenched in the community, the community just holds them to be true and applicable to the relevant states of affairs.[15]

In presenting such a view about some basic legal principles does Dworkin's position amount to a critique of legal positivism? If positivism claimed that law consisted only of legislated rules Dworkin would no doubt be right in pointing out that the elements of law are far more complex than positivism seems to assume. But, as John Finch has rightly pointed out, it is doubtful if any positivist, and especially Hart, ever held such a thesis.[16]

The central distinguishing feature of a positivist thesis is not its theory about the elements of law. Positivists would perhaps gladly grant Dworkin that law consists of more than rules. Its distinguishing feature is its assumption that basic legal propositions are of a kind whose validity depends merely upon the will of the people who define them, i.e. they are analytic a posteriori propositions. The question of validity arises, whatever the components of law are taken to be. On what grounds can legal principles, policies and rules—the elements which Dworkin entertains—be justified?

In the final analysis the answer given by Dworkin is not very different from the one given by positivists. Hart makes the rules of recognition a matter of fact entrenched in the practices of the community. Dworkin makes the principles and policies matters of fact entrenched in the practices of the community. We have already seen what serious problems theories which assert basic legal propositions to be 'matters of fact' are faced with. Such theories first confuse norms with facts, second they confuse basic legal propositions with propositions of other sorts of normative systems, and third by asserting that any arbitrary normative system which uses force can be a 'legal' system they legitimize violence. On the basis of the criteria that Dworkin provides for a 'legal' system one cannot distinguish a system by fiat, force or decree from a legal system; nor can one distinguish a religious system from a legal system, for all such systems are based on principles entrenched in a community.

The basic inquiry concerning the grounds on which these entrenched principles and policies can be justified is, as in Hart's theory about the rules of recognition, prematurely and arbitrarily terminated by Dworkin. His theory only makes a statement about the fact that the people of the community will certain states of affairs and behaviour into existence; it does not tell us anything about why the community wills the way it does. In the absence of this fundamental explanation Dworkin's theory, like Hart's, fails to enlighten us about the behaviour of the community and hence about law.

The most natural analogue to Dworkin's claim that law consists of principles used by the people of the community seems to be claims about ordinary language as asserted by the followers of Wittgenstein.[17] If legal principles are just a set of rules practised by the community, does it follow that legal discourse is a 'language game' as some Wittgensteinians have thought religious discourse to be? In so far as the 'game' of language is a normative system this analogy is worth pursuing. But, as we have seen, the common grounds between law and language obtain only in so far as both are open cybernetical normative systems. What distinguishes such systems is their basic principles and the fundamental teleology involved in the dynamics of each system. To carry the analogy any further it would have to be shown that the basic principles of language, such as the rules of recognition, change, etc. are the same as that of law, or that the purpose in maintaining a linguistic system is the same as that in law. The ordinary language theorists who believe that the basic principles of language are nothing but principles entrenched in the practices of a community could at least use one argument in their favour. They could argue that there is a certain inevitability to some basic principles of ordinary language because such principles determine the limits of meaningful discourse within the community. To question such principles is to pass into the realm of the meaningless. However, it is very difficult to see what inevitability is attached to the principles of which Dworkin speaks. Given his conceptual scheme and criteria it appears impossible to argue for a particular social 'game' as against, say, the 'game' of following the dictator, or against participating in a social 'game' in which the basic rule entrenched in the community is that 'might is right.'

A comparison with Wittenstein's ordinary language theory brings out the fact that Dworkin's theory faces limitations similar to those which one usually finds in pursuing the viability and the intelligibility of notions of 'language games' and of 'forms of life'. Such notions are helpful in distinguishing the spheres of discourse. But when it comes to justifying the practices found in these spheres, or in justifying the criteria used to set limits to these discourses, or in ranking the priorities of choices in them, these notions are of little help.[18]

As it turns out then, Dworkin's theory is faced with exactly the same shortcomings and problems as other positivist legal theories. The basic reason for this is that in all its essential aspects his theory is, after all, not very different from general positivist thought.

I turn now to an examination of another version of legal positivism, a version that has been very influential in practice and hence calls for some serious attention. This is the theory of Karl Marx. Marx's theory involves a number of complicated issues, hence I will limit myself to an analysis of only his most crucial tenets which are relevant to the issues here.

The Marxist theory of law is an extreme version of legal positivism. Marx, like Austin, Hart and other positivists, believes that law is nothing but the dictates of certain people. Perhaps Marx took Austin, his immediate predecessor, very seriously and assumed his view to be presenting the truth. Just as it can be said that Bentham's analysis of the nature of law occurred almost *obiter dicta* in the course of his total literary output in many related fields, the same may be said of legal theory in relation to the writings of Marx.

Marx did not set out specifically to examine the nature of law, or the conditions for the possibility or the necessity of a legal system. His view on law was a consequence of his general assumptions about the conditions of economic exploitation.

Marx asserts a particular version of legal positivism. The grounds for the pecularities of this version can be seen to lie inherent in the Austinian or the Hartian account of law.

Unlike Kelsen, Hart thinks that law cannot have just any content. It must have a 'minimum' content which has a 'core of good sense' as found in natural law doctrines. Hart, however, dissociates himself from Thomas Aquinas by saying that this minimum (moral) content is dependent upon the prior assumption that survival in 'proximity of the other' is one of the aims which generates the necessity for law. He tells us that due to 'contingent' conditions, such as that men are vulnerable, limited in good will, intellectually and physically unequal and possess limited resources, it becomes 'necessary' to have law.[19] What he fails to notice is that these very inequalities and limitations can make it possible for the advantaged to interpret the 'core of good sense' in such a way that they gain the most from it. The more resourceful also have a greater say in interpreting the 'minimal content'. It would not be wrong to suggest that precisely such resourceful and less vulnerable people come to be 'officials' in England and elsewhere. Judges and parliamentarians come mostly from the advantaged class of society. If law is what they make it and if Hart is right in asserting that there is no external criterion for evaluating what law ought to be, or for limiting what officials ought to do, then Marx is clearly right in asserting that law is nothing but an expression of the bourgeoisie.

Austin alleges that law is what the sovereign recognizes and dictates, Hart makes it what officials recognize and dictate. Marx agrees with them. He only goes on to tell us that such officials ought not to be dictating the laws. The Marxist view of law thus stands or falls with Hart's or Austin's view; and Hart and Austin provide the grounds for Marxist claims.

In so far as Marxism accepts positivism it shares its central shortcoming, namely the inability to provide a criterion to distinguish between arbitrary rules of the dictator and laws. However, unlike Austinian or Hartian legal positivism, the Marxist theory presents a deeper and a more serious kind of positivism because it at least faces problems directly. It accepts first that there is a direct relationship between the moral beliefs of officials and the law, and second it does not ignore the central question about the position and social status of officials within the legal system. It attempts to give an account of both these issues in terms of the economic relations amongst people.

However, although the Marxist critique attempts to present a useful analysis of the social position of the officials involved, when it comes to solving the central problem facing legal positivism, namely the ability to provide the criteria by which one can distinguish between a system by fiat or force and a just system by the laws of the community as a whole, the Marxist theory does not fare any better. In fact by taking a Hartian type of theory to be a true description of what constitutes law and by overtly indentifying the arbitrary rules dictated by the dictator or the bourgeoisie with law, the Marxist theory makes it extremely difficult for itself to characterize the rules dictated in a communist society by the community as a whole. Since Marx identifies laws with the ideology of the bourgeoisie, the absence of the latter entails the absence of laws. But this creates the further problem of explaining the existence of rules in communist society. Pashukanis,[20] Vyshinsky[21] and Lenin,[22] amongst others, have attempted to solve the problem of the status of law in a communist society and the reason for its persistence. These further problems about the status and persistence of law in a communist society only arise if we accept the basic Marxist thesis that law is what is dictated by the bourgeoisie or the dictator. If we do not accept such a legal positivism then the problems that arise on the cessation of the ideology of the bourgeoisie do not concern problems about the existence or the persistence of law. Since I find the basic Marxist belief that law is whatever the bourgeoisie dictates to be questionable and unwarranted, this is the issue that I shall discuss here. I shall not concern myself with problems such as those discussed by Pashukanis, Vyshinsky, Lenin and others, which arise only after one accepts the basic Marxist contention about what constitutes law. Notwithstanding the individual differences amongst these thinkers, the basic tenets which are common to all their views and which concern the issue at stake here are, I think, clearly summarized in the following paragraph of *Capital*:

> It is furthermore clear that here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally

> establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. And such regulation and order are themselves indispensable elements of any mode of production, if it is to assume social stability and independence from mere chance and arbitrariness. These are precisely the form of its social stability and therefore its relative freedom from mere arbitrariness and mere chance. Under backward conditions of the production process as well as the corresponding social relations, it achieves this form by mere repetition or their very reproduction. If this has continued on for some time, it entrenches itself as custom and tradition and is finally sanctioned as explicit law.[23]

Law, as understood by Marx and Engels and Marxists in general, does not get its legitimacy from some a priori principles, nor is it oriented to the idea of justice. Law is essentially a part of the ideological superstructure which arises above the material reality of the control of the means of production. Law, according to Marxism, is used mainly as a means of dominance and an instrument of the exploiters who use it in the interest of their class. Since the Marxists identify law with the power of the bourgeois the question about which affects the cessation of which is interpreted both ways; law withers if the bourgeois goes and vice versa. Accordingly we find no significant place for law in the *Communist Manifesto* except in terms of what is to wither away.

The Marxist view of law thus essentially amounts to the following contentions:

i) the concept of law is totally exhausted by or reducible to class ideology.
ii) the concept of law does not have an independent status, it is a part of the general superstructure of class ideology of which the concept of a political state is also a part; hence,
iii) the general grounds or conditions for the existence and the withering away of the state are also the grounds and conditions for the existence and the withering away of law.
iv) law is only the expression of the will of some human beings; in a deeper sense then, there is no concept of law, there is only the concept of class ideology.

Thus to contend that there *is* a concept of law one *has* to show the falsity of these contentions. One has to show that law has a status independent of arbitrary class ideology and that the conditions for the existence of law are different from those for a political state.

Since Marx identifies the basis for law with that of the political state the conditions for the legitimacy of the political state also become the conditions for the legitimacy of law. If the two conditions are identical then on what grounds can one justify the type of state which, according to Marx, needs to be first brought about, namely, the dictatorship of the proletariat? Evidently one cannot justify such a government by saying that it is in accordance with certain rules of law, nor could one say that it is justified because Marx or some other Marxists tell us that it is, for that would amount to basing the political state on arbitrary fiat. The problem here, as Kelsen and others have noted, is one of self-stultification or contradiction.[24] By not providing a criterion for a non-ideology the Marxist account is open to the charge of being another ideology.

Marx was aware that his own doctrine of ideology endangered his social theory. It was probably for the purpose of defending his theory against the objection that it is an ideology, in the derogatory sense, that in the *Communist Manifesto* he asserts that at a certain stage of class struggle 'the bourgeoisie itself supplies the proletariat weapons for fighting the bourgeoisie, so that a portion of the bourgeoisie goes over to the proletariat and, in particular a portion of the bourgeoisie ideologists, who have raised themselves to the level of comprehending theoretically the historical movement as a whole.'[25]

Such an explanation if true provides an insight into the reason why the bourgeoisie (including Marx himself) comes up with a theory, but it still does not explain why one particular set.of ideas must be accepted by the proletariat from amongst the various alternatives that the bourgeoisie may come up with at a particular time or the different views that the same bourgeoisie may present at the same time. In the absence of the criteria which can distinguish non-ideology from ideology (in the derogatory sense) the insistence that one must accept Marx's view becomes in the final analysis a matter of fiat or decree.

The very possibility of accepting or rejecting the Marxist theory, or any set of ideas for that matter, demands that there be some ideas on the basis of which particular philosophies of action can be accepted or rejected. There are indeed such ideas, to which even Marx appeals. These are the ideas of equality, justice, freedom, etc.

The basis of our understanding of such ideas must be independent of the Marxist theory, for it is only when we think that the Marxist theory can lead to greater equality, justice, etc. that we accept his theory. If these notions are to be defined by his theory then there would be no grounds for arguing why one must accept his theory, or why some people accept it in the first place. In the next part of the work I shall attempt to show how the notions of equality, freedom and other basic legal notions do not derive their legitimacy from any social or economic theory.

Even if we grant that many rules legislated by the bourgeoisie are to exploit the proletariat, it does not follow that every rule that the bourgeoisie legislates is law. It only follows that the bourgeoisie is exploiting others on the basis of some rules which they claim to be laws and they use force to demand obedience. To my understanding Marx has successfully shown that a great many rules dictated by legislators in fact create the conditions for the exploitation of the many by a few. But such an economic analysis makes it all the more necessary to distinguish between laws which do not exploit and arbitrary rules which do. In characterizing all laws as exploitative rules the Marxist theory not only cuts away the ground for the rules it itself prescribes, in the last analysis it is also unable to provide a distinction between a just social system (on the basis of laws) and an arbitrary social system on the basis of rules expressed, commanded or dictated by someone.

The idea of law, as I shall attempt to show, cannot be rejected, for it provides the very conditions for the rejection and acceptance of ideas and theories. What we have to reject are the rules which the exploiters pass off as laws. To be able to do so it is evidently required that we clearly understand what laws are (which the people accept) and what are mere rules which the bourgeoisie (deceptively) imposes as laws. It is necessary to proceed to this task now. The next part of the work will examine the substantive requirements on the fulfilment of which a normative system becomes a juristic normative system and legislates laws.

PART IV

THE JURISTIC REQUIREMENTS OF A NORMATIVE SYSTEM

I LAW AS A JURISTIC NORMATIVE SYSTEM

The juristic requirements are those necessary and sufficient conditions on fulfilment of which a normative system can be a legal system.

To explicate the juristic requirements one must, I think, approach the question systematically by asking four basic questions:

i) *What conditions make the legal system possible*? The possibility in question here is not just a material possibility. It is a basic formal or conceptual possibility. Given that there is a social order or a human world, what is so peculiar and specific to its nature that a legal system is at all possible? Why is a legal system basically made possible by human beings? Could the social order or the world not do without one? This is the sense of the 'possible' that Kant called a transcendental possibility. The question in other words is: how and why is the legal system transcendentally possible?

ii) *What conditions make the legal system actual*? The answer to the first question will only show why a legal system is possible, but everything that is possible is not necessarily actual. Entities which are logically impossible cannot of course be actual in the sense of being tangible and usable, for example square circles. But we cannot say this about entities which are logically possible. That is, by merely thinking of a notion which is logically possible we cannot conclude that it can be actual, even if we can imagine it very vividly. The conditions required to make an entity actual are different from those conditions which are required to make it merely possible. Consider for example what requirements would have to be fulfilied to bring a logically possible entity such as an unicorn into actual existence; perhaps we would have to find some way of breeding horses with one horned cows! However, whether or not we succeeded in this, in attempting to bring an unicorn into existence we would have learnt the important lesson that the conditions under which something is actual are not the same as those under which it is merely possible. The conditions which make a possible entity or states of affairs actual are what Kant called the metaphysical conditions. The second important and systematic question, hence, is: what are the metaphysical conditions on fulfilment of which a possible legal system becomes actual?

iii) *What conditions maintain the continuity of a legal system?* Having found out what requirements make a legal system possible and actual, the next natural question is: what will maintain it in actuality? When a system remains in existence it becomes dynamic or continuous. The conditions which spell out the direction or the way the continuity is maintained tell us about the teleology involved in the continuity of a system. The third important question can hence also be asksed as: what are the teleological requirements of law?

iv) *What conditions make the legal system efficacious?* An actual and dynamic legal system must be practically organized and operated in such a way that it becomes a viable system. Certain conditions are necessary for the possibility of efficacious legislation. Hence the fourth important question can also be asked as: what are the legislative requirements of a legal system?

The task in this part of the work is organized in accordance with the four basic questions mentioned above. The first section inquires into the possibility, i.e. the transcendental requirements of law. The second section examines 'actuality' conditions, i.e. the metaphysical requirements of law. The third section investigates the conditions for maintaining a continuity in the existence of law, i.e. it investigates teleological requirements. The fourth section analyses the basic practical conditions which make a legal system work, i.e. it analyses legislative requirements. The issues and problems involved in each of these different types of requirements will be further explicated in their respective sections.

SECTION I

THE TRANSCENDENTAL REQUIREMENTS OF LAW

I THE TRANSCENDENTAL REQUIREMENTS OF LAW

Ttranscendental requirements are those on the fulfilment of which something or some system becomes possible.[1] In the earlier parts of this work it was argued that basic legal principles are necessary synthetic a priori normative propositions which must be followed if a legal system is to be created and maintained. But from this it does not follow that a legal system is itself necessary. Basic legal propositions will be absolutely necessary in all normatively possible states of affairs if the creation and maintenance of a legal system is itself a necessary choice that must be made when it is possible to choose between various normative systems. In other words it is necessary to show not only that the basic legal propositions are necessary for a legal system but also that a legal system in necessary in the social order. Otherwise in the final analysis basic legal propositions remain only relatively necessary to the system by law and not absolutely necessary in the social realm. In this section I shall attempt to show that the legal system is itself absolutely necessary. If the legal system is necessary then it must be transcendentally possible. That is, its transcendental possibility would have been shown if its absolute necessity has been established. I am not of course assuming that whatever is necessary must be possible; in this section I intend to show that law is necessary and possible.

II THE IDEAL OF SYSTEMATIC TOTALITY

If a legal theory is unable to explain why the legal system as a whole (in its totality) exists, the theory and our understanding of law remains unsatisfactory in a very fundamental way. The theory fails to enlighten us about the most basic reasons for which a legal system is brought into existence. It fails in other words to tell us about the basic ideals which the legal enterprise in its totality is attempting to achieve. The ideals of the systematic totality are presently referred to as the 'spirit' of law; this 'spirit' is distinguished from the letter of law. But what precisely is this 'spirit'? Unless we can clearly and consistently characterize the spirit of law how can we tell whether the letter of law is in accordance with the spirit of law? Or, what relationship holds between the spirit and the letter? The problem is not that we are using an ancient term to refer to the ideals of the systematic totality of law, but that we do not exactly know what this term connotes even in modern times. To be able to know whether the letter of the law is appropriately related to the spirit of law it becomes extremely important to understand what the ideals of the systematic totality of law are.

An explanation which seeks to explicate the systematic totality would consist of showing why there is any legal system at all instead of there being no legal systems in the world. The principle of sufficient reason does not limit itself to a demand for the explanation of particular juristic propositions, it demands that the totality of the legal order itself be explained. The question why there is any law at all rather than no law is indeed a particular case of the general Leibnizian question: why is there something rather than nothing?

An analysis which seeks to understand the basic transcendental grounds for the existence of the legal system is certainly faced with many difficulties. But in so far as this task is the most important aspect of a legal theory one can ignore it only at the expense of either creating a baseless structure, which can lend itself to dubious interpretations, or a superficial system of thoughts which may conceal rather than reveal its actual intents.

As far as I know, no recent theorist has attempted to show the uniqueness of the legal order among other social orders, or to justify it in its totality. Perhaps Fuller's 'eunomics' would have amounted to such an attempt if he had carried it to its logical conclusions.[2] Since recent legal theorists have not addressed themselves to this most basic and primary issue which confronts the legal enterprise, it becomes necessary to return to earlier philosophers such as Leibniz and Kant who have dealt with these issues.

My analysis takes its roots in Leibniz's philosophy, mainly in his metaphysical views. A consideration of his views is necessary because many of Kant's responses, which I am going to consider in detail, are directly or indirectly (through Christian Wolff) related to Leibniz's views. In fact, as will become evident through the course of this part of the work, just as Kant's epistemology can be understood as a response to Hume's questions, many of Kant's moral and legal views can be best understood as a response to and as a development of some basic Leibnizian views. Kant it would seem did not always find it important to indicate the historical roots of his thoughts.[3] This is not to say that Leibniz's own views are totally original. As is known they are a development upon, amongst others, the views of the Schoolmen, of St Augustine and even of Plotinus.[4] However, it is necessary to take Leibniz seriously because there are many elements crucial to a development of the idea of law which are to be found in his philosophy but not in the philosophy of legal theorists before or after him. Leibniz's and Kant's views, as I shall show, complement each other in some important ways. I do not find myself in agreement with some of Leibniz's and Kant's major tenets; however I do find others which are extremely valuable and which need to be further explored.

III FACTUALLY POSSIBLE AND NORMATIVELY POSSIBLE WORLDS

The legal system is a part of the social world, it is not a system in nature. Since it belongs to the social world, unless we have a clear understanding about the notion of a social *world* and what distinguishes such a world from the physical world, it will not be possible to comprehend the role that the legal system plays in the social world. If we are to understand the spirit of law—the ideals of its systematic totality—it will be necessary to understand the larger framework within which it is situated and the purpose that it serves or is intended to serve within this framework. The larger framework within which the legal system is situated is evidently the social world, which consists not only of the legal system but also cultural, religious, political, educational, recreational and other systems.

The distinction between the social world and the physical world that I am making here is not a new distinction, it is as old as human thought. The Greeks distinguished between the 'physis' and the 'nomos'. The former being the physical realm and the latter the realm in which man's law, culture, etc. are to be found. In the Indian tradition the distinction has been made between '*samsar*' and '*prakriti*', where the former is the realm within which man enacts his deeds and the latter the physical realm. The legal system belongs to *samsar* and not to *prakriti*.

The social world, as noted, consists of various systems. Common to all these systems is the fact that they are created and sustained on the basis of norms; hence it is best to give these systems a collective name by indentifying a feature common to them all. I shall hereafter refer to them as the normatively possible systems which belong to the normatively possible world. The normatively possible world is to be distinguished from the factually possible world. This distinction is the same as the one made in earlier parts of this work between normatively possible states of affairs and factually possible states of affairs. The subsequent reference to this distinction in terms of 'worlds' is only for the sake of brevity, nothing more is implied. The two different kind of worlds are not like two different planets but they are two totally different sorts of orders. The qualitative difference between them is of course what this section intends to explore.

Leibniz distinguished between the physically possible and the morally possible. Morality is after all a set of norms. Besides, many descriptive propositions are norms and not factual propositions. Hence it would be more appropriate to distinguish between the physically (factually) possible and the normatively possible rather than between only physical and moral possibilities. 'Normatively possible' is a wider concept, it would include within itself the morally possible.

The normatively possible worlds created by human beings consist of various artifacts and normative systems such as associations, committees, clubs, fashions, conventions, etc. There are morally good organizations, such as some religious organizations, and morally bad ones such as the Mafia or the black market. The legal order is one social organization amongst numerous other organizations. Is such an organization just one convention amongst other? Is it like a fashion which may be in vogue for some time and cease to interest people later? A theory which attempts to provide the basic reason for the existence of the legal order must not only be able to distinguish it from other social orders, such as particular conventions, it must also specify its relationship to the whole of the normatively possible world so that the legal order is uniquely located in such a world. Since the legal order is one possible system in the normatively possible world the characterization of its relationship to the rest of the world requires a deeper inquiry in to the reasons for the existence of all possible worlds.

Leibniz raised two basic questions—why is there something rather than nothing, and, why are things as they are and not otherwise? He answered the first question by saying that God wills or desires there to be something rather than nothing, it is God's nature to so desire. He answered the second question by saying that God being perfectly wise creates the most perfect possible world. His wisdom behind the act, exemplified in the reason for the act, explains the fact that it is this rather than another world which was created.[5] God's choice of this world thus comes to serve as a substantive ground for the principle of sufficient reason since it explains why things are as they are and not otherwise.[6] The world according to Leibniz, is not only morally good but also metaphysically perfect.[7] His view on this topic is perhaps best summarized in Theodicy 8, which reads as follows:

> Now this supreme wisdom united to a goodness that is no less infinite, cannot but have chosen the best. For as a lesser evil is a kind of good, even so a lesser good is a kind of evil if it stands in the way of a greater good: and there would be something to correct in the actions of God if it were possible to do better. As in mathematics, when there is no maximum or minimum, in short nothing distinguishable, everything happens in the same way, or if that is not possible nothing at all happens: so it may be said in respect of perfect wisdom, which is no less orderly than mathematics, that if there were not the best among all possible worlds, God would not have produced any. I call 'World' the whole succession and the whole agglomeration of existent things, lest it be said that several worlds could have existed in different times and in different places. For they must needs be reckoned as one world or, if you will, as one Universe. And even though one should fill all times and all places, it still remains true that one might have filled them in innumerable ways, and that there is an infinitude of possible worlds among which God must needs have chosen the best, since he does nothing without acting in accord with supreme reason.[8]

Grotius had earlier sought to establish a scheme of natural justice in a theory based on the needs of human society alone, and had hence observed that it would retain its validity even if God did not exist.[9] Leibniz remarks upon this observation that it would still be desirable for men to believe in the existence of God for the sake of the consequent psychological inducement to behave rightly.[10] But, and this is important to note, he nonetheless agrees with Grotius and states that 'it is not a necessary requirement for the formal basis of justice that it should be a rule promulgated by a higher authority.'[11] In asserting the autonomy of the idea of justice Leibniz is not denying God's perfection. For Leibniz both the rules of logic and of justice are independent of God's existence; even God has to follow them in creating the world. God's perfection lies in the fact that he does so by his very nature. In his *Discourse on Metaphysics* (section 3-5) Leibniz explains that: i) God obeys the moral law ii) causes no injury to any creation, and iii) gives each monad his due. These three percepts of justice are evidenced in the process of creation and display the moral as well as the metaphysical perfection of God. Why is God bound to obey these principles? Leibniz tells us that such principles of justice are binding upon any being capable of love and wisdom, i.e. upon any being that can possess moral qualities by having both reason and will. Since God possesses both attributes he is the author of justice by his very essence, not by his will.[12] The fact that God, like any other spirit, is thus necessarily subject to the demands of justice means that he ought to behave in the best way; he is constrained by the moral necessity of his obligation. God has a duty to create the best of all possible worlds although he is always free not to do so. The world from God's point of view is contingent, but from our point of view it could not have been other than it is:

> And thus we have a physical necessity derived from metaphysics. For though the world is not metaphysically necessary, in the sense that the contrary would imply a contradiction or logical absurdity, it is nonetheless physically necessary or determined in such a way that the contrary would imply an imperfection or moral absurdity.[13]

What Leibniz distinguishes here, and in general, is the difference between physical impossibility and moral impossibility. This distinction in Leibniz's moral theory finds its full expression in Kant, although, as we shall see, there are some crucial differences and confusions in the end. Leibniz's God who acts by his own nature becomes Kant's holy or fully rational will and, as in Leibniz, any other being possessing both reason and will who is not a holy will is obliged to act morally. That is, reason constrains him to act morally. We saw that according to Leibniz God is obliged and constrained, albeit by his very nature, to create the best of all possible worlds. But to what end is the less rational will morally obliged or constrained? The answer to this is neither clear in Leibniz nor in Kant, although on analysis it can be seen to be implicitly present in both their moral theories. This is the point at which there is confusion in a major way, in the end, in Kant's theory. In the next section I shall discuss Kant's answer in detail because he, having developed Leibniz's moral theory, had more to say on the issue. But before we can get to that it will be important and necessary to discuss the notions of moral imposibility and factual impossibility in greater detail in Leibniz's theory.

As mentioned before, God, according to Leibniz, is bound not only by the percept of justice but also by the percepts of logic.[14] He cannot create a world in which contradictory propositions exist or in which a thing both has and does not have a property. Further, once he creates a particular object, that object can exist only with those other objects which have compatible properties, i.e. which allow each other's mutual existence. Since there is a 'conflict' for existence, creation automatically produces the largest compossible set of possible individuals. ('Compossible' is Leinbniz's term for possible together). Only the compossible set has the maximan variety, according to Leibniz, for only such a set is a perfectly ordered series. Any random series might well leave 'gaps' into which further possible individuals could be fitted. The logical perfection of a complex system such as the world is thus understood as a combination of *variety* and 'order' together. Such a combination generates the single Leibnizian concept of *harmony*, which is found when many things are summoned together into a kind of unity.[15] The notion of the 'most perfect world' thus has a specifiable content because there is only one way in which the criteria of order and variety could be satisfied at the same time. That is, there can be only one maximally compossible world.

The notion of maximum compossibility for Leibniz is required not only on purely logical grounds but also on moral grounds. That is, the best world is not only physically what it ought to be but, from the point of view of values, also morally what it ought to be. Any other world would make its creator unjust. Since God is just the world that he creates must have all and only those moral predicates which it ought to have. If there were two worlds then they would be distinct due to at least one moral predicate which one world would have and the other would not; but then neither of the worlds would be perfect and God would not have done his duty.

We shall see subsequently (while discussing the notion of the best normatively possible world) some possible confusions about the notion of the maximally compossible world. Here it will be important to pursue the central issue in detail, namely the question of the role and the limitations of the creator rather than of what he creates. Man too, after all, is a creator.

It is important to be able to distinguish a basic question which is always valid from some solutions to it which may be specific to one's time and place. Whether or not all of Leibniz's solutions are universal is a different inquiry. An appreciation of the basic question raised by him which applies to all times and societies can, however, be undertaken independently. It seems to me that since most philosophers have been involved with Leibniz's solutions the significance of his basic questions has failed to receive the attention that is its due. An important and basic philosophical question raised by Leibniz is this: for anyone who wills to create are there some necessary conditions which must be satisfied for creation to be possible, or is the process of creation a matter of random and arbitrary activity? Leibniz's answer, as we have seen, is that the process of creation is not an arbitrary and random activity; there are logical and moral constraints. For creation to be possible, an object must be logically possible, physically compossible, and the activity itself must be morally possible. Leibniz does not explicitly say that logical possibility refers to objects and moral possibility to actions, but I think he can be taken to be clearly implying this.

Now, we do not have to accept his metaphysics of monadology to appreciate his question. Nor do we have to accept the existence of the greatest monad (God), for even lesser mondas (human beings) are involved in the process of creation. It is not even necessary to accept the view put forward by some Christian theologians that God created the complete compossible set all at once. He could be doing it gradually, a little every day, even now. The question about the conditions of creation is independent of God's existence, even on Leibniz's own account. For, as noted, he too asserts with Grotius that the necessary principles of justice and logic are independent of any existing being. Thus for one who disagrees with Leibniz it is not enough to show that Leibniz's monadology is wrong or that God cannot be claimed to exist. One would have to show that the process of creation can proceed logically randomly and morally arbitrarily.

Why is the question about the conditions of creation significant for moral and legal theories? Any theory that grants that someone has free will entails that that agent can choose other than he has chosen and can thus create or construct his own possible world. To have free will is to be able to create according to one's desire and thus be the final cause for what is created. If there is only one agent with free will in the world then only one final cause and only one world is possible. However, if there is a plurality of free wills then there is also the possibility for a plurality of worlds. Any theory which grants that anyone other than God has free will entails that there can also be more than one possible world. Of course, most theories which grant a plurality of free wills also make a qualitative distinction between the type of free will that God has and the type that others have. Whereas God has infinite opportunities to will anything, others have a finite possibility. What they can create is limited. If there are two different types of entities in the universe, one infinite God and many finite human beings, all with free will, then it follows that there would be one possible world created by God and many finite possible worlds created by human beings. The factually possible world can be taken to be created by God, and the many normatively possible worlds are created by many finite human beings. If we human beings are continuously involved in creating normatively possible worlds in different ways, it evidently becomes important for us to know under what conditions it is possible to *create*, under what conditions it is possible to *maintain* what we have created, and under what conditions that which we have created would be *destroyed*. In a most fundamental way, moral and legal theories are nothing but attempts to answer these three basic questions.

Once we understand the concept of possible worlds in this manner, some puzzles and paradoxes raised by the followers of Quine, such as Bryce S. DeWitt[16] on the one hand, and Leibnizians such as Brandon Carter[17] on the other, cease to be straightforward contradictions. As it turns out the notion of possible worlds is a complex one which involves qualitatively different types of worlds. The complexity depends upon whether one assumes only one free will to have created the world or many free wills to have created different worlds or, finally, if one thinks that willing is not involved in creating the world. Those who wish to hold with De Witt and others that all possible worlds are actual and those who wish to hold with Carter and others that there is only one actual world are talking about different types of worlds. In the normatively possible world many possible worlds are actual. We can say this because we know that there are many finite free wills. In fact it can be noticed that those who have seriously contended the thesis of the plurality of actual worlds end up, as Nelson Goodman does, talking about normatively possible worlds.[18] Music, theatre, painting and other similar phenomena which Goodman discusses all belong to the normatively possible world, not to the factual world. Similarly, Benjamin Lee Whorf who proposes the many world theory in a different way also comes to such a conclusion by analysing language—another normatively possible states of affairs.[19] Of the factually possible world we know only one, and if Leibniz and Carter are right there can be only one.

The direction of the analysis about possible worlds that I have only suggested here no doubt raises as many problems as it attempts to solve. A deeper discussion of the metaphysical issues cannot be undertaken here. These brief remarks have been necessary to show first, that what I wish to say about the normatively possible world through the course of this work is not without appropriate metaphysical underpinings, and second that the notion of possible worlds is much more complex than is sometimes assumed. An understanding of the notion of the normatively possible world in the manner outlined here is necessary to appreciate a major problem that arises for this order of the world and not for the factually possible world. This is the problem of evil.

Leibniz's view that this is the best of all possible worlds seems to have one major flaw: if this is the best possible world why is there evil in it? Because of this problem his theory has not only been misunderstood but also came to be ridiculed by such men as Voltaire.[20] However, Leibniz was clearly aware of the problem. He devoted himself to it in the Theodicy. His solution to the problem of evil, as Bouillet has shown, is similar to that of Plotinus, Aquinas and St Augustine.[21] Leibniz explains:

> Where does the evil come from? ... Its source must be sought in the concept of the creature, in the nature that is contained in the eternal truths in God's mind, independent of his will. One must recognize that there is an original imperfection in the creature, even before it sins, because it is essentially finite: this means that it cannot know everything and can thus make mistakes and other errors.[22]

Leibniz's solution to the problem of evil has obvious parallels with that of the Scholastics and some Greek philosophers: it has some similar difficulties too. It is not necessary to discuss these here.

However, what is important to note is that in granting that evil occurs independently of God's will, Leibniz does not realize that he has at the same time removed evil from the best of all possible worlds which is created by God's will. In asserting that the source of evil is to be sought in the creature and that the creature has free will, evil becomes a part of the normatively possible world. When Leibniz talks about the best of all possible worlds he is in fact referring only to the factually possible world, i.e. the world created by the free will of God; but he confusedly includes in it the world created by man. If he had observed a clearer distinction between the two types of worlds (which I shall argue Leibniz observes confusedly) then the existence of evil would not be a contradiction, as it does become for Leibniz. That is, God would not be responsible for evil in the world since he did not create that world. Since evil is brought about by human will into the normatively possible world it can only be removed by human will from that world. This, as we shall subsequently see, becomes a major factor in our understanding and applying criminal law. Here it is necessary to pursue the further consequences that arise when one distinguishes between different types of worlds.

Whether or not God exists there is one thing we can be certain of, and that is that we eixst. As human beings we create a possible world. Computers and cities, pens and policemen, lamps and libraries, the courts and coins, etc. have all been created by human beings. When the Bible says that God created us in his own image or when the Gita says that the *Ataman* is a finite aspect of the *Parataman*, I think what they mean is that God's desire to create the best possible world is continuous in us. We too wish to create the best of all possible worlds.

In so far as we are creative agents we face precisely the same questions which any other creative agent (including God) would face: can creation proceed logically randomly and morally arbitrarily or are there some necessary constraints? I, like Leibniz, have argued that the logical and moral constraints are universal in the sense that they limit all creative agents, whether they are creating the factually possible world or the normatively possible world. These limitations and constraints are not external in the sense of being regulated by someone else, they constitute the very conditions within which creation is possible for a creator.

The fact that we desire to create the best world does not imply that we are able to do so. We would be able to do this if we were like God, in which case we would do it by our very nature and perhaps accomplish it in one stroke. But precisely because we are not like God, because we have limited knowledge and limited moral perfection, the creation of the best of all possible worlds becomes a task and a problem which can be formulated thus: *Create the best of all normatively possible worlds*. The task is to find the means of creating such a world, which can be formulated as: *Find and live by that normative system which will provide the conditions for the existence of the best of all normatively possible worlds*. One may ask why this task is a problem. It is a problem because the creation of the best normatively possible world demands the resolution of many incompatible and conflicting normatively possible worlds. As we shall see there can be only one best normatively possible world. Different free wills can and often do desire and attempt to create private normatively possible systems of a type not compossible with other normatively possible systems.

The important task for human beings thus becomes to design and operate a system which will make the creation of the best of all normatively possible worlds feasible.

This answers the question raised earlier that if God, who is a moral agent with both will and reason, is obliged to create the best of all possible worlds, what is the less rational agent, who also has both will and reason, obliged to do? The answer follows that being less rational does not change man's obligation, it only makes its fulfilment problematic. Man being a moral agent like God is in the end obliged to do the same thing as God, i.e. to create the best of all possible worlds.

IV THE BEST NORMATIVELY POSSIBLE WORLD

Before we proceed to inquire into the type of normative system that can provide the conditions for the existence of the best normatively possible world, it will be necessary to spell out the idea of such a world in greater detail. The basic and relevant notions will be discussed here, other related issues will be touched upon in the next and subsequent sections.

Since each free will desires to create its own system, i.e. to mould the world in accordance with its understanding, the best of all normatively possible worlds will be one which maximizes the possibility for such creative activities. However, the one that maximizes this possibility cannot be one that allows each creator to randomly and arbitarily create any normative system, since the aim of many normative systems is precisely to negate or destroy other normative systems. The best normatively possible world, hence, can consist of only those normative systems which are compossible, i.e. whose systematic aims either enhance each other or at least do not conflict. In such a state each free will can maximize its freedom.

By maximizing its freedom in a creative way in the normatively possible world, a particular will distinguishes itself from other similar creative wills. However, the conditions of the best world put clear limits on the possible ways each will can succeed in distinguishing itself through its creative actions. Not every spontaneous or deliberated act can be required or be helpful in distinguishing oneself. These limiting conditions must be examined.

First, the compossiblity criterion tells us that there is no outer limit to how much freedom can be maximized but there is indeed a vectorial limit to the expression of freedom, i.e. there is only one direction in which the maximal state can be attained.

Second, since the systematic aims of the normative systems in the best possible world do not conflict, it will also be the most *harmonious* possible world. The doing of evil, in one important sense, is the act of disturbing or destroying a normative system or its creator whose systematic aims are not immoral. Such an act, or the creation of a normative system which is instrumental for such an act, will be disharmonious with other normative systems whose existence is compossible with other systems. It follows therefore that in the best normatively possible world since there will be no disharmony, there will be no evil (although there may be disaster, calamities and accidents). The significant consequence of this (which can only be mentioned for the sake of completeness at this stage) is that in such a world the branch of law which concerns itself with evil acts and evil normative systems, namely criminal law, will not be required any more. This does not of course rule out other branches of law.[23]

Third, the best of all normatively possible worlds will also be one which allows for the possibility of the maximum amount of *variety*. Since the normative world consists of feats, artifacts and systems, variety in this case would mean the most compossible set of feats, artifacts and systems.

The notion of the most compossible set of artifacts requires some clarification since it has not been examined in the above discussion, directly or indirectly. Artifacts, as I argued in the last part, are neither nominal kinds nor natural kinds. They, being articles produced by feats (i.e. artifacts) belong to the normatively possible world and are, hence, normative kinds. Roughly, it can be said that an object is an artifact when there are norms which characterize that object; otherwise that object is a thing.[24] For example this mass of wood and iron is a table because there are norms about the conditions under which a mass of wood and iron, when certain feats are carried out, may be called a table. The table as an artifact belongs to the normatively possible world; as wood and iron it belongs to the factually possible world. Similarly a human being is an artist, a doctor, a scientist, etc. because there are norms which specify the feats required to become an artist or a doctor, etc. In such social roles a human being belongs to the normatively possible world. People, I think, hesitate to call a living thing an artifact because they seem to wrongly assume that the notion has something to do with 'facts', i.e. non-living things. This is not so. Artists, doctors, and prime ministers are artifacts exactly in the same sense and for the same reason that books and cars are. Each is an artifact in a different normative system. However, my intention is not to correct ordinary language. For the purpose here it is sufficient to recognize that the ontology of the normatively possible world, which includes artifacts, is different from the ontology of the factually possible world, which includes things. As human beings, having free will and being creators of the normatively possible world, we know this essential difference. It will be pertinent to illustrate this difference through an example. Suppose we go to another planet and see objects there, we might not know at once whether we are looking at a factually possible world or a normatively possible world. We would perhaps assume the former. If in such a case we have any grounds for believing that a particular object is not a mere thing but an artifact, then we would also have sufficient grounds for believing that the planet is inhabited with agents who have free will and who have created a normatively possible world.

With this understanding of artifacts we can now simply characterize the notion of maximal compossible variety in the best of all normatively possible worlds as the possibility of the existence of a maximum number of compossible normative kind or artifacts.

Again, it must be emphasized that a possible world which leaves open the possibility of maximum compossibility does not, of course, put any a priori limitations on the *size* of the population of the normative kind, it only restricts its development in a particular direction. That is, the notion of maximum compossibility is not the notion of the greatest number, with which it is sometimes confused.

What I have said here about the best of all normatively possible worlds is evidently Leibnizian, but it is also crucially different from Leibniz's thesis. It was necessary to reconstruct the framework of ideas in this manner mainly to distinguish between the normative and the factual world and thus to locate where exactly the problem about law and evil exists and in what way the notion of the best of all possible worlds is of direct moral significance for us. Such a characterization of the best world also avoids a possible error which is sometimes mistakenly deduced from Leibniz's theory. This error consists in concluding, for example, as Peter Geach does, that the notion of the best of all possible worlds is an inherently incoherent notion.[25] Geach compares the notion of the best of all possible worlds to the notions of the 'largest number' and the 'greatest happiness' and claims that just as there can be no 'largest number' or 'greatest happiness' since one could always add some more to it, there can similarly be no best world. The notion of the best world, as pointed out here, is categorically different from that of the 'largest number' or the 'greatest happiness'. Whereas the largest number is an aggregate of numbers, and greatest happiness can be taken to be an aggregate of happiness, the notions of the best of all possible worlds is not a notion of an aggregate. It is wrong to think of it as an aggregate of goods and then claim that it is not the best (greatest) because another good is still possible. The best of all possible worlds is not the sum of all goods, it is that state of affairs under which the sum of all goods can be increased infinitely. In other words it is the description of that ideal model within which alone *all* possible goods *may be* generated.

We have seen earlier that the notion of the best or the maximally possible world is not just a logical notion but also a moral notion. Moreover the best world is described not only by physical predicates but also moral predicates. Hence any attempt to interpret this notion must necessarily take the moral predicates into account. To interpret the notion purely numerically, as Geach does, is to overlook the essential moral aspect of the problem.

One way of dealing with the notion of maximal compossiblity which takes the moral aspect of the problem into account is to conceive the issue, as Leslie Armour does, in terms of 'unchangeability'.[26]

If the moral predicates are taken to be positive values, and evil the absence of such values, then within such a scheme the best possible world cannot be changed in any way that will displace or eliminate a positive value because then the absence of the positive value will amount to an introduction of an evil into the world, which will make the world less than the best.

Conceiving evil as an absence of goodness is of course itself laden with problems, but it is not an unreasonable way to understand the moral phenomena. In the present context it does the interim duty of providing a distinction in terms of which the best world can be characterized.

From the fact that the maximally compossible world cannot be changed in a way that will displace or eliminate a positive value, thereby creating evil, it does not of course follow that such a world cannot be changed at all. New positive values can always be added to such a world. The best world remains open in the direction of the addition of positive values but it is unchangeable in terms of the *types* of values that can be added to it. No such value can be added to it which will displace or eliminate a positive value.

Conceptualizing the best possible world in this way gives a sense to it which is not merely numerical. The type of values involved in such a world evidently raises many complexities for a moral theory, but a discussion of these issues will lead us away from the central intent of the analysis here. I proceed now to discuss the significance of these conclusions as they concern the normative systems in the present world.

V THE BEST NORMATIVE SYSTEM

Having described the essential details about the normatively best possible world, we must now turn to the important question: what means or methods must be adopted to create such a world? That is, which normative system will provide the conditions for the existence of the best world?

Let us start by seeing what such a system cannot be. First of all we can rule out any system that attempts to imitate or model itself in accordance with nature. The impossibility of imitating nature does not arise from any epistemological reason, such as that we do not know enough about nature, or that different people know differently about nature. It arises due to a metaphysical reason which emerges directly from the idea of possible worlds. What we are looking for is a system which will allow for the possibility of many free wills to exercise their freedom together. The factually possible world, or nature, is the exercise or the expression of either one free will, i.e. God, or of no free wills at all. In either case knowledge of the factual world cannot provide any grounds for imitating it in so far as one wants to build a system which will allow a number of creators to work towards diverse ends. Further, the decision to emulate any one natural system will, in the last resort, be arbitrary. We have no grounds for believing that any one natural system is superior to any other. All natural systems are equivalent. We cannot order them in a moral hierarchy. Lastly, propositions which describe facts are synthetic a posteriori. Building a normative system on the basis of such propositions is in fact an attempt to reduce it to some factual system. Such a choice involves one in a contradiction since, as we know, we have no choice about synthetic a posteriori propositions being as they are. Hence such reductionist attempts amount to denying that we have any choice in constructing a normative system. Choosing to assert that we have no choice, i.e. asserting that a normative system is like a factual system, clearly involves one in a self-deception, what may otherwise be called a 'false consciousness' or a 'bad faith'. However, whether or not one recognizes that self-decption is involved in attempting to reduce a normative system into a factual system, since a factual system is regulated by either one free will or no free will, we can, a priori, know what such self-deception will lead to. It will lead to a system in which either only one free will will be able to express itself, as in a totalitarian or a dictatorial structure, or in which no free will can express itself, such as in anarchy. There are many examples of such imitations, ranging from the Guyana cult of Rev. Jim Jones to the assumed factual Aryan superiority of Hitler's regime. In all such systems people organize themselves into a normative order on the basis of aspects of a factual system over which they have no control or for which they can take no credit, aspects such as the colour of their skin, their racial origin, their place of birth, etc.

If we cannot create the desired system by basing it on aspects of the factual system, can we model it after some particular normative system of the normatively possible world?

There are many normative systems, such as fashions, etiquette and customs, whose existence depends upon the creative activity of some individuals. Such normative activities are evidently temporary and arbitrary. It is their very nature to arise and then fade away, otherwise variety in the normatively possible world would not occur. The normative system we are seeking to identify and describe will be qualitatively different from any of these systems because it is not itself an outcome of variety. It is a system which will ensure that variety is always made possible and that no arbitrary limitation on compossible variety exists. For similar reasons such a system cannot be a particular *convention*. Conventions, like fashions, are the expression of the will of some definite agents. Conventions arise mostly for the sake of convenience; and as discussed in the last part, they are made possible by assuming some arbitrary propositions to be the foundational propositions. Such principles or definitions are analytic a posteriori propositions. These propositions are necessary, relative to a particular convention (say that of weights or of measure) but they are contingent from the point of view of all possible normative worlds.[27] The system we are seeking cannot be one convention amongst other conventions. It is something which makes the existence of various non-conflicting conventions possible. Also, its foundations cannot have arbitrary definitions which may be changed for the sake of convenience, as, for example, pounds, have been replaced by kilograms and inches by centimetres.

This brings us to the third type of normative system which is often presented as the best and the only model to fit the requirements. This is the system in which some human beings do not just set up arbitrary conventions for others to follow but command and compel others to follow them. *A system built upon decree, fiat, compulsion or force* will only make possible the existence of a normative system which is the creation of those limited individuals who have expressed their commands and have used force to ensure the desired behaviour. The systematic aims of such a system will be limited to the ones set by the particular individuals who are in control, hence variety in such a system will be limited. Such normative systems as the Mafia, the CIA, the KGB, the army and the police exemplify systems built on commands and force. Such systems have fixed aims and a limited variety of feats and artifacts which facilitate the use of force, or are instrumental to such an end. The system that we are looking for, which will allow optimal conditions for freedom and maximal compossibility of feats and artifacts, evidently cannot be of this nature, it cannot even have essential features in common with it.

The above arguments have been negative. They are intended to eliminate what cannot be the model for the system which will make it possible for us to create the best of all normatively possible worlds. More will be said about such systems in the subsequent sections.

If the system which will allow for the creation and sustenance of the best of all normatively possible worlds cannot be modelled after nature and based on matters of fact, nor based on conventions and analytic propositions, nor on a system of commands and fiat, what is its positive characterization? I have already outlined the logical, epistemological and other formal aspects of such a system earlier. In the following sections the substantive aspects of such a system will be discussed in detail. Here, in the process of positive characterization, I shall limit myself to presenting the minimal residual elements that remain after the rejection of the above three models, and which directly concern only the transcendental condition.

The required normative system will evidently be one which will allow for the creation and sustenance of the most compossible, most harmonious, and most diverse set of normative systems, feats and artifacts. It will maximize the conditions under which each individual or group of individuals can realize themselves and attain their moral ends.

Now, having rejected all types of systems which allow for the activity of *one* or *some* free wills, we are left with only one type of system that will maximize the possibility for the self-fulfilment of *all* free wills. There can be only one system with regard to which all stand in the same relation. That is, there can be only one system that can satisfy the conditions which will allow for optimal compossibility, harmony and variety. Any other system will eliminate the development of *at least one* free will, and thus will fail to be the type of system that we want it to be. The idea of such a system is the idea of a legal system. It is only this system which can satisfy all the mentioned conditions. It follows therefore that the legal system is not just relatively necessary but absolutely necessary. It is the only system that makes possible the best of all normatively possible worlds.

When people co-operate, their actions are compossible and when artifacts or things coexist, their coexistence is compossible. Further, what I have termed diversity or variety here is sometimes referred to as 'plenitude'. In these terms what has been said above can be described as follows: the normative system, called the legal order, is metaphysically absolutely necessary because it is the only system which can maximize co-operation and coexistence, and in which the principle of plenitude can operate. When the principle of plenitude operates it makes the world not just possibly but actually (i.e. metaphysically) richer. Hence it can also be said that the legal order is necessary because it is the only order which makes possible the metaphysical enrichment of the world.

Thus as it turns out the most fundamental ground for the obligation to act in accordance with the law is neither the will of the sovereign nor the dictates of socially accepted officials. It lies in the necessity which binds all creators to create the normatively best possible world by means of the only best normative system, i.e. the legal system. All creators are bound to create the normatively best possible world because it is the only system in which *all* creators can create, and the conditions for such a society are made possible by one and only one normative system—the system by law. It is only by creating that people realize their individuality and social freedom, whether it be a creation of things, artifacts or norms. The acceptance of the sovereign's will or that of the officials' has its justification in these metaphysical truths: they are not by themselves the basic grounds.

VI THE INTELLIGIBILITY OF THE NORMATIVELY POSSIBLE WORLD

Some basic notions discussed in the earlier sections are directly related to the thoughts of Kant and Leibniz. I shall examine these relationships in detail now so as to sharpen the distinctions between the view presented in this section and those of Kant and Leibniz. The discussion will also attempt to place the view presented here in a historical perspective.

In arguing that the idea of the best of all normatively possible worlds is the transcendental requirement for the possibility of a legal system, it may *prima facie* seem that I have contradicted the Kantian dictum that the idea of freedom provides the transcendental condition for the practical determination of the will by human reason. On a closer examination of Kant's various works, however, it becomes evident that there is in fact no conflict here.

Law for Kant is external morality. As he argues in the *Metaphysik der Sitten* it ensures the 'outer form of freedom'. Freedom in Kant's view, therefore, is a transcendental condition for both internal and external morality, i.e. for virtue and law.[28] Being the transcendental condition for both aspects of morality, the notion of freedom expresses itself in two different but related ways in the two aspects. From the point of view of the individual, freedom is expressed in the idea of autonomy, and from the perspective of external morality for the community the idea of freedom is expressed in the idea of the Kingdom of Ends. The ideas of autonomy and of Kingdom of Ends do not provide us two different transcendental ideas but the same ideas from two different perspectives. In fact, as Kant tells us in the *Grundlegung*, the formula for the Kingdom of Ends—so act as if you were through your maxim a law making member of a Kingdom of Ends—springs directly from the formula of the autonomy of the will—so act that your will can regard itself at the same time as making universal laws through its maxim.[29] The difference between these two formulations is that whereas the first concerns the individual as a *member*, i.e. as belonging to a community, the second concerns him as an individual legislating maxims for himself.

The Kingdom of Ends of the *Grundlegung* takes the form of the 'Ethical Commonwealth', with some variations in details, in the *Religion innerhalb der Grenzen der Blossen Vernuft*.[30] In the *Metaphysik der Sitten* Kant talks of the Ideal State, but the essential characterstics of the Ideal State are not very different from the Kingdom of Ends. In the *Kritik der Urtheilskraft*, Kant is very explicit in asserting that the necessary end of the possible world, whose transcendental condition is freedom and not causality, is to create the best of all possible moral worlds. It is only with regard to such an ideal that man's existence in the world can be understood.[31] In such an Ideal State the free will can maximize its freedom in a community.

I think Kant is undoubtedly right that the idea of freedom is a transcendental presupposition for law and morality in so far as the individual's actions are concerned, and that the idea of the Ethical Commonwealth is the transcendental presupposition of law and morality from the point of view of the community, i.e. is so far as it concerns the individuals as members. I have myself emphasized that the transcendental idea of an agent's free will, which is involved in his creating the world, is as significant from the individual's point of view as the correlated transcendental idea of the best normatively possible world from the community's point of view. The creation of the best normatively possible world is the ideal end of co-operative human actions. However, in not emphasizing the idea of the Kingdom of Ends in the *Metaphysik der Sitten*, Kant seems to have misled readers who attempt to understand his theory of law by studying this work alone.

If the transcendental condition has these two distinct aspects, one from the point of view of the individual and the other from that of the community, one may ask why Kant himself has not made these distinctions clear. In Kant's analysis of morality and law there seems to be some basic confusion about the idea of a community and about the relationship that the individual has to the community. This leads to various other confusions. The network of these confusions seems to run through the whole of his moral and legal theory. I shall trace only one of these confusions, the one that has its roots in the problems concerning the idea of the possible world, since such a discussion bears upon the issues presented earlier.

Everything we say about objects or systems in the world presupposes some beliefs about the nature of the world. Since the seventeenth century both the Atomists and the Cartesians have been impelled by discoveries in the natural sciences to separate the physical world from the order of the spirit or mind—the two realms which both the Platonists and the Aristotelians had held together by the same principles of order of the forms or ideas. Whether discoveries in the natural sciences should make one a Cartesian is questionable, but the fact that philosophers have been involved with the problem of different realms in all ages clearly suggests that the source of the problem lies not in these empirical discoveries but, as I have been arguing, in the conceptual a priori considerations of what is entailed in accepting that there is a plurality of free or autonomous wills. An autonomous will is a final cause, it determines itself. If there are two different types of final causes, one having an infinite potential and the other a finite potential, then there are at least two different types of realms.

Leibniz distinguished between the Kingdom of Nature and the Kingdom of Grace. The Kingdom of Grace is a kingdom of rational minds, all of which are in communion with God. For Leibniz, as natural laws are determined by the best possible to have metaphysical necessity (and not a merely logical one), so moral imperatives have a moral (and not a purely logical) necessity. On these two kinds of laws the two Kingdoms of Nature and Grace are founded.[32] However the distinction between the realms is not always clearly defined by Leibniz. We saw earlier that because of this confusion he was not able to place evil in the appropriate realm. Even in the Kingdom of Grace Leibniz later brings in a Kingdom of Light which is supposed to be a superior kind of Kingdom of Grace.[33]

Since Kant had the advantage of building upon Leibniz and avoiding his errors, the distinction between possible worlds stands out more clearly in his works. In his first major philosophical work, *The Inaugural Dissertaton of 1770*, Kant sets out to examine 'The Idea of the World in General'. In this he distinguishes between the Sensible world and the Intelligible world.[34] From this work to the last 'Opus Postumum' there seems to be a gradual and continuous (but not always a straightforward and consistent) development in his idea of a world. Although the idea of the Sensible world seems to get various consistent interpretations throughout Kant's works, becoming 'Corporeal Nature' towards the end in the *Metaphyische Anfangsgründe der Naturwissenschaft*,[35] the same cannot be said for the idea of an Intelligible world. The history of this development evidently requires a separate work. In what follows I shall only catalogue and mention the crucial points at which Kant makes substantive remarks about the idea of the world which are of direct relevance to the idea of law.

The following paragraphs (20) and (21) of the *Inaugural Dissertation*, seem to suggest Kant's fundamental reason for believing that there must be at least two types of realms. This seems to be similar to the grounds that I have been arguing for; however, these paragraphs, at the same time, also exhibit what seems to lie at the core of Kant's inconsistent characterization of the Intelligible world:

> The substances of the world are beings deriving from another, not,

> however, from different beings, but all from one. For suppose them to be the effects of a plurality of necessary beings; then, since the causes are without any mutual relation, the effects would not be in interaction. Accordingly unity in the conjunction of the substances of the universe is a consequence of the dependence of all upon one. The form of the universe bears witness to the cause of its matter, and only a single cause of all things can be the cause of its totality; there cannot be an architect of the world who is not also its creator.
>
> If there were a plurality of first necessary causes with their effects, these would be worlds, not a world, because they would not be in any way connected to form the same whole. And *vice versa*, if there be a plurality of actual worlds outside one another, there is a plurality of first and necessary causes, with no interaction between one world and another, nor between the cause of one world and the world depending upon another cause.
>
> It follows that a plurality of actual worlds outside one another is impossible not by its very concept (as Wolff wrongly concluded from the notion of a complex, or aggregate, a notion which he thought equivalent to a whole as such), but only under this condition, that there exists one single necessary cause of all things. If more than one be admitted, a plurality of worlds (in the strictest metaphysical sense), external to one another, will be possible.[36]

Although Kant accepts the plurality of possible worlds when there are many first causes, in arguing that there will be no interaction between them he seems to be simply repeating something like Leibniz's view that the worlds (monads) are 'windowless' closed worlds, without reflecting on the implications that such a thesis entails for a moral theory. If the monads cannot interact there can be no community. The very possibility of a community presupposes that the possible (normative) worlds not only interact but that they also resolve and unify themselves. The possible world that the different first (necessary) causes create is of course the normatively possible world, not the factual one. Hence the interaction between possible worlds is an interaction between the normatively possible worlds. For the factually possible world the question of interaction does not arise in the same way, because we do not know whether there is more than one such actual world. The idea of the community is precisely the idea of the resolution of many conflicting normatively possible worlds into one world. One may characterize this as Parmenides' or Plotinus' problem of 'the One and the many' for practical reason. The problem for theoretical reason is how 'the many' can be resolved into 'the One' in knowledge, whereas for practical reason it becomes how 'the many' can be resolved into 'the

One' in practice. Since, as we have seen, law is the only means to the one best possible world, it becomes the only solution to the metaphysical problem of 'the One and the many' in so far as practical reason is concerned. The idea of the best possible world or the Kingdom of Ends is a practical idea used to bring into existence what does not exist but can be made actual by our conduct; it can be made actual through a legal system.

In the light of this discussion, Kant's formulation of the moral principles (which applies to both the external and internal morality, i.e. to justice and to virtue) can also be understood as directly related to the problem of 'the One and many' in the sphere of practical reason. By acting on the Formula of Universal Law—act only on the maxim through which you can at the same time will that it should become a universal law[37]—many conflicting normatively possible worlds are resolved into one world in which all the laws apply to everyone. On the other hand, the Formula of the Law of Nature—act as if the maxim of your action were to become through your will a universal Law of Nature—presents to us an analogy.[38] Nature has already resolved the conflict of the many and presents itself to us as one. If our laws were like the Laws of Nature, they would be laws of one world. But why does Kant say 'act', in the first formula stated above and 'act *as if*' in the second? This is precisely because he assumes, as I too have been emphasizing, that since we cannot choose to act *in* the factual world we can at best act *as if* we were acting in it so that our rules would be universal, like the laws of the factual world. Although we cannot act *in* it, we can nonetheless act *on* parts of it and control it. This brings us back to the complex notion of possible worlds and the difference between the normatively possible world and the factually possible world.

In his *Inaugural Dissertation* Kant equates the Intelligible world with the Intellectual world and the Sensible world with the phenomenal world. He points out in this work (para 3) that his distinction is similar to the phenomenal-noumenal distinction of the 'older' and 'ancient' schools. In the *Dissertation* the noumenal or the Intelligible realm is known at least intellectually. By the time of the *Critique of Pure Reason*, the two realms are clearly distinct due to the fact that the fundamental principle of the phenomenal realm is *Causality* whereas the fundamental principle of the noumenal realm is *Freedom*. However, here he equates the noumenal realm with the 'things-in-themselves' which are totally unknowable.[39] A similar view is presented in the *Groundwork of Metaphysic of Morals*, where the thesis of two standpoints, that of the Sensible world and that of the Intelligible world, is said to resolve the paradox about viewing the same action as both necessary and free.[40] Here again the Intelligible world is not knowable.[41] In the subsequent *Critique of Practical Reason* Kant argues that the postulate of freedom is very different from that of God or the Immortality of the Soul. Freedom implies the moral law and is reciprocally implied by it, thus its reality is affirmed.[42] Here the Sensuous world becomes 'natura archetypa' and the supersensuous or the Intelligible world 'natura ectypa'.[43] Now Kant tells us that an object of 'natura ectypa' is 'an object of practical reason ... possible through freedom.'[44] Are such objects knowable or not? They must indeed be, because in the *Metaphysik der Sitten* Kant identifies the *de jure* possession of objects as intelligible or noumenal possession, and indeed we know the objects that we possess *de jure* and not just *de facto*. The *de jure* realm of mine and thine is an Intelligible or noumenal realm.

Such an Intelligible or noumenal realm, in which reason is used practically and not speculatively, is precisely that which I have been calling the normatively possible world. Such a noumenal realm is intelligible only because there are various synthetic and analytic propositions which function as norms in the realm, and which make possible for us an essential knowledge of such a realm.

It may be argued that Kant's characterization of the Intelligible world is in fact consistent, that he always meant to say that the Intelligible world is knowable in so far as reason is used practically and not speculatively. This perhaps is the likely interpretation. However, as noted, Kant himself provides many grounds to show that this interpretation cannot be conclusive.

The basic reason for Kant's confusing treatment of the notion of the Intelligible world seems to lie, as mentioned before, in his incomplete analysis of the idea of community. In the *Inaugural Dissertation* (para 16) Kant tells us: 'In what principle does this very relation of all substances rest, which intuitively regarded is called space? The question of the principle form of the Intelligible world turns, therefore, upon making apparent in what manner it is possible for several substances to be in mutual commerce, and for this reason to pertain to the same whole, which is called world.'[46] Although Kant is right in asserting that the question turns upon making clear in what manner it is possible for several substances to be in mutual commerce, he is evidently mistaken about the fact that the principle for the Intelligible world, on which the relation of all substances rests, concerns space. For, as it finally turns out in the *Metaphysik der Sitten*, the *de jure* or Intelligible noumenal realm is not in space in the same sense.[47] Kant's error seems to stem from the fact that the 'mutual commerce' that he is considering is in fact not between *all* substances, as he seems to assume. He has only considered human 'commerce' with sensuous things, where sense perception is of major concern. Man's 'mutual commerce' with man is indeed different in principle from that of his 'commerce' with things. For, in such a commerce there is, amongst other things, a reciprocal relationship; as Existentialists like to state it: 'not only I objectify the other's subjectivity in perception and use, even the other objectifies my subjectivity.' There are hence different types of commerce between different types of substances.

This confusion in the *Dissertation* seems to have been carried over, without any significant change, into the *Critique of Pure Reason*. Here Kant presents the concept of 'community' (reciprocity between agent and patient) as a pure a priori category of the Understanding.[48] In the Third Analogy it becomes 'the Principle of coexistence, in accordance with the law of reciprocity'. Such a concept of community, in fact, seems to be the Leibnizian notion of Apperception; it is not the sense in which agents belong to a community in the Intelligible world, for here the reciprocity is not between agent and patient but between agent and agent. It is in the phenomenal world that agents perceive sensible objects. It follows therefore that the concept of community which Kant presents in the Third Analogy is a category of the Understanding with reference to the phenomenal world alone. For the Intelligible or noumenal world, in which the legal enterprise exists, a different concept of community is needed. Kant's list of the Categories of the Understanding is hence incomplete.

What interests us here is not the incompleteness or the inconsistencies in Kant's philosophy as such, but how such confusions affect the idea of law. Since Kant's characterization of the Intelligible world is not clear, his distinctions within it also face similar problems. The central and the most significant distinction within the Intelligible world concerns what one opposes to the best normatively possible world, i.e. to the idea of the Kingdom of Ends; for the legal order must provide the conditions for the best world, but this can only be done if it also somehow delimits the conditions for the worst world.

Since the Intelligible world is the normatively possible world, the opposition of the Kingdom of Ends or the Kingdom of Grace to the Kingdom of Nature, which Kant and Leibniz uphold, is indeed a misleading opposition. What has to be contrasted with the Kingdom of Nature is the normatively possible or the Intelligible world, not the Kingdom of Ends. The Kingdom of Ends or of Grace is the best of all possible worlds. We do not know whether the Kingdom of Nature is the best of all possible phenomenal worlds, we do not even know whether there are many phenomenal worlds.

What has to be contrasted with the Kingdom of Ends is the State of Nature, especially of the Hobbesian kind, where all people are against each other. However, the phrase 'State of Nature' is misleading, it suggests that we are talking about the factual world whereas we are really talking about a certain state of the social world. Perhaps the phrase 'State of Nature' is the cause of some confusions that we find in Leibniz, Kant and also in Locke and Hobbes. Both the Kingdom of Ends and the State of Nature belong to the normatively possible world. When discussing the State of Nature we are not discussing societies of ants or bees or monkeys or dolphins, we are still talking about human society, the difference being that we are now talking about human society at its worst. Whereas the Kingdom of Ends is the ideal characterization of the best of all normatively possible or Intelligible worlds, the State of Nature is the ideal characterization of the worst of all normatively possible Intelligible worlds. In such a state everyone always uses the other as a means to something and never treats the other as an end. This is the state of maximum conflict and maximum incompossibility. Now, given a certain understanding of human nature and communities, it is doubtful whether the worst state ever existed or can exist in the future, i.e. it is doubtful whether it can be a historical fact. However for the purpose of practical reason it does not make any difference whether or not the worst Intelligible world is a historical fact. What practical reason needs to comprehend is the ideas of the best and worst possible worlds, whether they exist or not. Such comprehension is necessary to give direction to personal and social actions.

The State of Nature is nothing but a social state of total anarchy, and the idea of Kingdom of Ends is the idea of Utopia. Since these two states of society are ideas which human reason can comprehend a priori, i.e. even without their actual existence, it is natural that the human imagination has been busy trying to visualize them substantively. The pathological state of total anarchy thus finds expression in the notion of hell or *narak*; whereas the notion of Utopia finds expression as heaven or *swarga*. These are ancient notions. As human reason develops it is natural that these notions too will develop and moreover that we shall try to actualize them as much as possible. Thus in later history we move to the notion of the 'City of God' in Augustine, or the 'Kingdom of Grace' in Leibniz, or *Ram Rajya* in India. And later still to the notions of 'Kingdom of Ends' or 'Utopia' in Thomas More. In modern times similar ideas are expressed in the notions of 'true democracy', 'real socialism' and 'communism'. Since human reason has developed we evidently know more about the necessary conditions of a perfect society when we refer to it as 'true democracy' than when we referred to it as heaven. It does not matter what name one gives to the best society, provided one gives it a meaning in which all basic legal principles mentioned in this work find place, and where nothing contradicts them.

Since the first basic legal principle obliges us to create the best normatively possible world, the creation of Utopia is a legal obligation which binds us all. As such it is natural that this obligation will be expressed in legal documents in various ways. As law progresses we must expect to find better and clearer descriptions of utopian conditions in our legal documents. In Section IV (III) I shall discuss the exact manner in which such conditions find a place in law.

SECTION II

THE METAPHYSICAL REQUIREMENTS OF LAW

I THE METAPHYSICAL REQUIREMENTS OF LAW

The metaphysical requirements are the necessary and sufficient conditions on fulfilment of which a possible entity or a system becomes actual. In the last section I discussed the basic conditions in which the possibility of a legal system is grounded. I shall now proceed to examine the further substantive requirements that have to be necessarily fulfilled if a legal system is to actually exist.

The clarity and precision with which one can define the principles which make a legal system actual will evidently depend upon how clearly one is able to distinguish law from other normative systems, and also how distinctly one can specify the relationships that obtain between the legal system and some related systems.

To start with we have three distinct ideas about normative systems whose relationships and distinctions need to be specified: the idea of a moral system, the idea of a legal system and the idea of a coercive system. Philosophers have often attempted to relate the idea of a moral system to that of the legal system but they have ended up identifying the notion of a legal system with that of a coercive system. None of these relationships should be assumed as self evident, each needs to be explained and justified. The statement that a legal system is different from a moral system, and especially the statement that the legal system is a coercive system, have been repeated so often that they have begun to sound like undeniable truths. True as such assertions may sound, in the absence of appropriate justification it would only be arbitrary to believe that a legal system is a coercive system. As I shall attempt to show, the assumptions involved in such beliefs are not as simple and clear as has been assumed.

In what follows I shall first examine the relationship that obtains between the idea of a normative system conceived as a moral system and the idea of a normative system conceived as a legal system. Having done this I shall next consider the relationship that obtains between the idea of a normative system conceived as a coercive system and the idea of a normative system conceived as a legal system.

This analysis will establish some of the conditions that are necessary for a possible legal system to exist as an actual system. Having finally separated the idea of a legal system from all its extraneous elements I shall present and discuss some of the basic necessary legal propositions. Others will be discussed in the respective sections.

In the subsequent analysis the basic legal propositions will be discussed first from the perspective of the community and secondly from the perspective of the individual. This is required because, as we shall see, the two perspectives raise separate problems.

II LAW AND ETHICS

In the last section it was argued that the legal system is transcendentally the best and the only normative system which can provide the conditions for the best of all normatively possible worlds. If there is only one normative system that can lead to the best world and if such a system must be a moral system, then it follows that the legal system *is* indeed *the* moral system. Let us see how this comes about.

It has been shown that the possible world divides itself into two types, the factually possible and the normatively possible. Whereas the presupposition of the first is causality, that of the second is freedom. Freedom, as Kant has argued, must be presupposed to be a property of the will of all rational beings.[1] Human reason is involved in investigating both the principles of the factual world and those of the normative world. In the normative world reason utilizes some basic principles to determine the freedom of the will when it involves itself in the practical sphere of individual and social activity. Such basic principles are the *Laws of Freedom*.

The determination of the will by reason requires that there be no obstacles. Traditionally, two types of obstacles have been conceived. In the first the agent somehow becomes an obstacle to the exercise of his own free will. In the second other agents, in one way or another, become obstacles to the exercise of the free will of an individual. Laws of freedom concern the agent's freedom in both these senses. In Kantian terms an agent becomes an obstacle to himself when his will is determined by inclinations and passions rather than by reason. In such a case his will is constrained. It blindly follows its inclinations for the satisfaction of some arbitrary end. Kant tells us that a morally good action, in which a will is freely exercised, must be done by an autonomous, self-legislating will. Our ordinary moral judgements, according to him, show that we locate the moral value of an action in its motive; we refuse, for example, to attribute moral worth to actions done from motives of self-interest or immediate inclinations, even though such actions are objectively in conformity with duty.[2] We judge that such actions would be morally good only if they were done from a motive of duty. By analysing the concepts of action done from a motive of duty we find that the action is determined through the thought that it is in conformity with the basic moral principles, or the laws of freedom.

In contradistinction to causal laws, the laws of freedom are *moral* laws. Now, in so far as the obstacles to freedom are internal, i.e. when the agent becomes an obstacle to his own free will, laws which are directly about or which concern the internal obstacles to freedom may be called *ethical* laws.[3] But when the obstacles are external, i.e. from and due to other agents, laws which refer to external obstacles are juridical or *legal* laws. Positively, it may also be said that maxims which an agent legislates to himself and which are in conformity with laws of freedom are ethical laws. This internal legislation, of course, concerns the moral ends chosen by an agent. In contrast to these, maxims which two or more agents mutually legislate for themselves and which are in conformity with laws of freedom are legal laws. This external legislation concerns the moral ends which are common to all agents.

This may roughly be said to be Kant's own view as well. But his characterization of 'ethical' laws does not always seem consistent. He often refers to ethical laws as moral laws, whereas according to his theory the term 'moral laws' should refer to both ethical and legal laws since both have to be in conformity with the laws of freedom which are moral laws. A typical example of the confusion in Kant's terminology can, for example, be noted in the following important passage.

> In contradistinction to natural laws, the laws of freedom are called *moral*

> laws. Insofar as they are directed to mere external actions and their legality, they are called *juridical;* but when, in addition, they demand that these laws themselves be the determining grounds of actions, then they are ethical. Accordingly we say: agreement with juridical law constitutes the *legality* of actions, whereas agreement with ethical ones constitutes its *morality*.

The last conclusion is evidently misleading. It suggests that legal actions are not moral actions, which is evidently false within Kant's definition of juridical actions, which too conform to the moral laws of freedom. If the last proposition is to be consistent with the lines above it should read: accordingly, we say: agreement with juridical law constitutes the *legality* of actions, whereas agreement with ethical ones constitutes its *ethicality* (if one may presently use the word to make the point). Kant often uses morality in an ambiguous way in so far as law is concerned. He sometimes asserts that the concept of morality applies to both law and ethics, but sometimes he reserves the term morality for ethics alone. At such times he confusedly contrasts law with morality. This, as we shall see as we go along, is partly due to Kant's general confusion about the nature of law.

The freedom to which jurdical laws refer is freedom in its external exercise whereas the freedom to which ethical laws refer is freedom in the internal exercises of the will, in so far as the will is determined by reason. Since both the external and internal exercises of freedom are in accordance with the laws of freedom, which are moral laws, it would not be inappropriate to characterize law as the *external* morality and the ethics as the *internal* morality, although Kant himself did not use the terms in this way. Such a distinction, I think, would make Kant's thesis about the laws of freedom more consistent.

The consistency will become evident if one considers the sense in which Kant meant law to be *external,* with reference to the moral laws of freedom. Law for Kant is external, first, in the sense that it has to do with the relations of one person to another in so far as their actions (as events in time) can have an effect on one another; by this all actions which affect only oneself are excluded from the scope of law. Secondly, law is not concerned with the relations between how the mere wishes of one person may relate to the actions of another person; it is not the business of law to prescribe benevolence to others.[5] Thirdly, law concerns itself with the question of whether the exercise of free choice on the part of one can harmonize with the freedom of the other.[6]

Law is, then, external morality. What this means exactly and what such an idea contains will be explained in detail in the course of this section.

The first most significant consequence of these arguments is that for both ethics and law the starting point is the a priori propositions of pure practical reason, which are the supreme principles of morality, or the Laws of Freedom. Although the principles by themselves do not prescribe any specific actions as duties, because they are the ultimate criterion of right or good actions we can derive from them moral laws which state what are our rights and duties.

The basic moral principles express the essence of free or rational actions; and because all moral laws are derived from these principles, they must state the condition under which human conduct is in keeping with man's nature as a free agent. Moral laws, Kant explains, 'command for everyone, without taking his inclinations into consideration, merely because, and in so far as he is free and has practical reason.'[7] They are laws for men, not as rational agents who desire some end, but simply as rational or free agents. The negative implication of such an assertion is that neither juridical nor ethical laws can be based upon the desire for happiness which pertains to man's sensuous nature. Both are laws of freedom prescribing, essentially, the conditions of rational or universally valid actions rather than the means for attaining happiness. This of course does not mean that happiness may never be achieved by acting ethically or legally, but only that happiness does not enter into the criteria of moral goodness.

In any legislation, Kant explains, we can distinguish two things: a law and a motive. The motive provides a determining ground of choice when a person or a group legislates.[8] In ethics, pure practical reason of an individual is itself legislative, it provides not only the norm for conduct but also the constraint accompanying the norm.[9] The motive is that of doing one's duty for duty's sake. The situation for juridical laws is different. The difference consists of the fact that pure practical reason is legislative not through one individual's will but through a collective decision taken by the community as a whole.

Since juridical laws are laws of external morality (although Kant does not makes this clear) it follows that as in the case of ethical laws the motive for these laws cannot be of a sensuous origin, nor can the laws be based on considerations of usefulness. As in the ethical case, the motive once again is doing one's duty for the sake of doing it. The central difference in the two motives are the types of duties involved. Whereas in the ethical, autonomous legislation the duty is towards persons (including oneself), in juridical legislation the duty is not towards persons but towards the community as a whole. *The duty is to create and sustain a civil society which is the best of all normatively possible worlds*. Such a duty is of a non-sensuous origin and must be done for its own sake. This is the most basic proposition of law. Since the moral goodness of our actions lies in our motives, the duties enjoined by juridical legislation must be actions which are morally necessary, independent of our attitude of will.

It follows from this thesis not only that acting according to ethical principles for the sake of duty is morally good, but also that acting according to legal principles for the sake of duty is morally good. The fact that law as external morality must finally be based on non-sensuous motives is of course my view and not totally Kant's. Kant once again seems to have opted for different alternatives at different times.

Having characterized law as rules for external freedom in accordance with the moral laws of freedom,[10] Kant confusingly assumes that juridical legislation cannot concern itself with the interior determination of choice through a non-sensuous motive. He thinks it can only employ natural sensuous means of constraint. Since there can be no action without a motive and since juridical legislation is concerned that certain actions be committed or omitted, it supplies, according to Kant, a motive—namely fear of punishment—which should be effective if others are wanting.[11] Now such a view which makes the motive for legal action fear rather than some sense of duty not only contradicts Kant's general thesis that law is moral, at least in so far as it is in accordance with the Categorical Imperative, it even conflicts with his thesis that we have a duty to maximize the possibility of external freedom for everybody. It was Kant himself who argued in *Theory and Practice* that we have an unconditional duty to create and maintain a civil society in which outer freedom can be obtained for all.[12] If we really do have such a duty then evidently the reason for acting legally lies here and not in any fear or anxiety. As it seems, then, Kant overlooked the relationship between his two findings: law as external morality and the duty to build and sustain a legal system in a civil society so that outer freedom may be maximized.

What distinguishes law—what the community legislates for an individual, and ethics—what an individual legislates for himself, is the mode of legislation and the type of duty involved, *not* the type of constraint imposed, as Kant and other thinkers have wrongly concluded. For, just as no one can constrain an autonomous will to act ethically, no one can constrain it to act legally. For an act to be ethical or legal the agent must act of his own free will. Kant and others have thought that the fundamental difference between ethical and juridical legislation is that in ethical legislation pure practical reason has only the thought of duty with which to exercise necessitation on choice, whereas in juridical legislation the legislator can force people to act legally. This is both conceptually and empirically false for, as we have seen, in juridical legislation too pure practical reason has the thought of duty towards the community with which to exercise necessitation on choice; and secondly, if legislators could force people to act legally all crime and evil would have been surppressed a long time ago. There is enough nuclear armament to threaten and force people to act legally. Since acting legally is acting morally, people must voluntarily act legally. Nobody can constrain and force anyone to act legally. External constraint or compulsion is required when a moral agent *fails* to act legally, i.e. morally, nor *so that* he will act legally. But this involves us in conceptualizing the relationship of law to coercion in a totally different way and calls for a detailed analysis of its own. I shall devote the next section of this part to this question. Here it will be important to summarize the essential thesis of this section.

It is by considering the laws of freedom accompanied by one or the other type of duty that we determine the nature of juridical and ethical laws. Laws and ethics must consist of rules expressing, each in its own terms, conditions for free actions and the basic ends to be achieved. Since all moral laws are derived from the laws of freedom, which express the laws of pure practical reason in its applications, every moral law is accompanied by the constraints of pure practical reason alone. Whether the laws arise in juridical legislation or in ethical legislation, morally legislative reason in both cases constrains us to fulfil the duty from the thought of duty alone. In law the principles of pure practical reason are regarded as the principles of the communal or the general will, whereas in ethics we regard them as principles of our own will and then go on to obtain from them the system of duties to which they, so regarded, give rise. In requiring that the actions described by juridical laws be done merely for the sake of their rationality, one evidently asserts that juridical laws are based on principles of pure practical reason. If this were not so the constraint imposed upon people who fail to act legally would never be *reasonable* or rational, it would be indistinguishable from mere violence.

III LAW AND COERCION

One of the most serious and perhaps the most harmful of misunderstandings that has plagued humanity seems to be the confusion between the idea of law and the idea of a coercive order. The principles and the systematic aims of a coercive order are very different from those of a legal order.

A legal system is not a convention, hence it is not founded on principles which go into creating and sustaining a convention. Neither is it a system of force, fiat or decree, hence it is not founded on principles of command, whether they be dictatorial or martial. It is not even a factual system which can have principles of nature at its foundation. *A legal system is a system of external morality founded on the laws of freedom of pure practical reason.* As such it is not possible to coerce anyone to behave legally. Enforcement of law is hence a contradiction in terms. ('Enforcement of morals', a phrase which Lord Patrick Devlin used, betrays a double confusion.[13] Morality is precisely the kind of behaviour which can never be enforced).

Force is used when people fail to behave legally; and then the aim of using force is not to make them act legally but to prevent them from acting illegally in the future. This is all that compulsion or coercion can achieve, it cannot bring about lawful acts.

Lord Devlin and his opponents have for a long time debated whether or not law must enforce morality. Such a debate clearly presupposes that law and morality are something which can be forced on someone. The foregoing discussion shows that such a presupposition is groundless, hence the extensive debate whether law must enforce morality is misconceived at its very foundations.

In what follows I shall attempt to make the roots of this confusion explicit.

The reason behind the confusion between the legal order and a coercive order seems to be inherent in a deeper confusion concerning the idea of justice itself. One way in which the basis of this confusion can be made explicit is by analysing Kant's treatment of the notion of justice. However, the analysis would be applicable to any other similar idea of justice which makes law a coercive system.

In the *Metaphysik der Sitten* Kant tells us : 'Justice is therefore the aggregate of those conditions under which the will of one person can be cojoined to the will of another in accordance with a universal law of freedom';[14] and also that, 'Justice is united with the authorization to use coercion.'[15] Using these two principles as premises, Kant goes on to conclude that 'Strict justice can also be represented as the possibility of a general reciprocal use of coercion that is consistent with the freedom of everyone in accordance with universal laws.'[16]

Now is the above conclusion legitimate? It seems to be a case of standard logical fallacy. From the proposition 'p entails q', if one is given p, it would be legitimate to infer q; but if one were to infer p when given only q that would indeed be an invalid conclusion. But such a fallacy is precisely what Kant seems to have committed. From the premise: the concept of justice entails the concept of coercion, Kant seems to have wrongly inferred in the conclusion that reciprocal coercion is entailed in a just system. All that follows from the proposition that justice is united with the authorization to use coercion is that coercion can be just, it does not follow that whenever there is justice there is coercion. In other words the truth of the statement that justice is united with coercion entails only that we can justly authorize some people to use coercion, but it does not entail that a system in which just actions are done is a coercive system. Kant does not make it clear in what sense of 'united' justice is united with coercion. The sense of this union would become clear if we ask : when is justice united with the authorization to use coercion? The answer is: only when people have failed to act justly of their own accord, or when they have done some unjust acts. In either case coercion enters in or becomes necessary only when just actions are absent. It is only required in the last resort to keep some people away from a system in which (most) other people are carrying on with their just acts. If by such coercion these same people are reformed and are willing to carry on with just acts of their own accord, then coercion is not used on them any more. That is, they are not prevented by coercive means to join the larger system in which most people act autonomously.

Kant's two definitions of justice, uniting justice with coercion, thus conceal the truth that they refer to two totally different classes of people. Coercion is not used on people who are co-operating and participating in a just system but on another class of people who are not acting justly, or are at least acting illegally. Kant does not observe this difference in his definitions; he is thereby led to a false conclusion in which he seems to assume that the class to which the laws of freedom apply is also the class to which coercion applies.

Hence Kant's conclusion that 'justice can be represented as the possibility of reciprocal coercion' is both logically and referentially false. Justice can never be represented as the possibility of reciprocal coercion. So long as people are acting justly in a system they are not coercing each other in any way. In fact all law-abiding citizens are acting justly because they either think that it is their duty to do so or that it is the right, moral way to act. They are not so acting because their friends, neighbours, relatives or some government officials are coercing them all the time to act in this manner. There is no reciprocal coercion between citizens, friends, relatives or acquaintances to make them act justly. Of course all citizens are aware that if they act unjustly, coercion can be used to stop their future unjust acts. But this is altogether a different matter because when coercion is so used people who have acted unjustly are (physically) removed from the arena in which just actions are done, such that the question of reciprocal coercion may not even arise for them.

The idea of law is not the same as the idea of justice. These are two different although related ideas. The idea of law is the idea of a social institution at work. The idea of justice provides the ends and means that such a social institution is trying to achieve. If these are two different ideas, how does Kant move from the idea that justice is coercive to the idea that law is coercive? This is evidently by using the tacit premise that a legal system is a just system. From such a equation one can conclude that if a just system must be coercive then so must a legal system. But, as we have seen, a just system is a free, voluntary enterprise between human beings. If such a social system consisting of just actions must be non-coercive, and if law is a just system, then it follows that law must also be a non-coercive system.

What is the root of Kant's erroneous idea that in a legal system (a just system) everyone coerces everyone else reciprocally? This is perhaps not too difficult to unearth.

Kant's belief that 'justice can be represented as the possibility of reciprocal coercion' is based on the belief that: 'Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it'.[17] He tells us this at the very outset of the discussion about coercion. This belief in turn (as it becomes clear when he 'constructs' the notion of justice in the subsequent paragraph) is based on a principle that applies to the factually possible world. Kant tells us: Justice exhibits this [reciprocal coercion] concept in a pure a priori intuition on the analogy of the possibility of the free movement of bodies under the law of the equality of action and reaction.[18] Kant gives us no grounds for believing why such an analogy must hold. He seems to arbitrarily take a principle that belongs to the factually possible world and applies it to the normatively possible world. This particular error (as noted while discussing Kant's idea of the community) seems to have been carried through all his works. One of the factors which distinguishes the noumenal realm from the phenomenal realm is precisely the truth that the Newtonian law of equal action and reaction (reciprocity) cannot be said to apply to the noumenal realm. Only because of this, for example, when someone steals my coat I can give him my hat too, I do not in turn have to steal his coat; or when someone hits me on one cheek I can present him the other, I do not have to hit him back. In fact as Kant himself argued, all moral actions are done for their own sake, unconditionally, not because one receives a reciprocation of equal and opposite worth, although no doubt sometimes one may be psychologically inclined to think otherwise.

Kant is thus also wrong in believing that any opposition that counteracts the hindrance of an effect *promotes* that effect. Coercion can never promote freedom in the true sense of the word. It can at best restrict the actions of some people so that others *may* act freely. As a matter of fact history shows that coercion promotes the employment of more coercion, just as violence leads to more violence. In any case Kant's gravest error seems to be in his failure to see that his whole moral theory is based on the very possibility that man can transcend the Newtonian law of reciprocity, and thus do moral actions in the noumenal realm in a way that no reciprocal results of his actions are either required or necessary. This oversight seems to have its worst consequence for law, i.e. external morality, where the question of coercion comes up in a major way for the first time.

If the proposition 'justice is united with the authorization to use coercion' is in fact a complex conjunction of at least two propositions: the proposition that a system of just actions exists and the proposition that when someone acts unjustly coercion may be authorized to prevent him from doing so, then it follows that in so far as justice is concerned there is not one but two distinct problems for pure practical reason to solve. The first one requires that we find out how to create and sustain a just normative system, and the second requires that we find out what to do when someone acts contrary to the principles of such a just normative system. The first problem is the problem of building and running a legal system, and the second is that of substituting an alternative system for it when the system does not work or when some agents in it fail to conform to the rules, leading thereby to anarchy or violence.

Pure practical reason tells us (through the principle that justice is united with the authorization to use coercion) that under the conditions of failure force may be justly substituted for reason and that such a substitution will not be violence, it will be justified coercion. Of course what makes such a substitution (of reason by force) *just* must be observed very carefully. There are two elements to this, first that force is used only by people who themselves belong to the legal system as fully autonomous moral agents, and second that it is done only when a genuine failure of law has occured, i.e. when reasoning has not worked. This may be taken to have occurred when one or many people have tried their best to *reason* the matter with the person who has acted unjustly (this is done in private or public meetings or in a court) and when it has been proved beyond *reasonable* doubt that the person acted contrary to the principles of the just normative system. What constitutes 'proving beyond *reasonable* doubt' is indeed a difficult legal question. Realizing the central significance of the problem, lawyers and jurists have naturally devoted themselves to an extensive examination of this notion, and there is indeed sufficient clarity for practical purposes. But since what 'reasonableness' consists of cannot be determined totally a priori, one must expect a natural development of the concept in legal literature as the enterprise matures.

Pure practical reason thus provides for two sorts of normative systems: the legal system and a morally inferior (second best) coercive normative system which replaces the legal system if it fails to come into existence. A coercive normative system is one such as that which exists by the command and rule of the police or the army. When people fail to live by the rule of law they are forced to live by the command of the police. In such a situation the rule of law, i.e. law itself, does not *exist*. Life is structured by rules of force.

The legal system, as noted, is based on principles of reasoning which involve such activites as debates, discussions, fact finding, study of cases, systematic observation and listening, etc. The working of a coercive normative system is based on principles of force which involve acquisition of and expertise in arms, the ability to move quickly in space and time, cunning and skill—such as who can plot and plan more probable schemes to outwit the other, etc. The two types of normative systems are thus qualitatively different types of systems.

It follows from the foregoing account that *the police and other coercive systems are neither a part of the law nor its extension*. Far from being coercive, law cannot even entertain the possibility of having coercive elements as its extensions.

If a legitimate coercive system such as the police is a substitute for a legal system and not its extension, what is its relation to the other institutions of civil society? The coercive system is an extension and an instrument of the state, specifically the political system.

The political system is not the same as the legal system, the two are distinct and distinguished not only in terms of their basic structuring principles but also in terms of their systematic aims. Besides the confusion about law and morality, there seems to be an equally pervasive confusion concerning the distinction between the legal system and the political system. Although most thinkers ordinarily seem to feel and accept that legal and political systems are distinct, the basic foundational distinctions do not seem to have been spelt out clearly. However, in this work I shall not examine in any detail all that is contained in the idea of a political system, for that concerns the idea of the state and thus demands a separate work by itself. But in so far as the idea of law is distinct from the idea of the state, the unique characteristics which distinguish a legal system from a political system must be clearly spelt out. In earlier chapters I have already argued that legal systems are distinct from political systems in terms of the foundational principles they are based on, i.e. whereas legal systems are based on synthetic a priori propositions, other types of systems are based on analytic propositions which work as foundational propositions for conventions. The difference between the legal system and the political system will be further sharpened as we go along. Here I will concentrate on the theme of this section—namely coercion, which further distinguishes legal systems from political systems.

For the sake of clarity, it will perhaps be best to spell out the differences between political and legal systems as distinct points, in so far as they relate to the issue of coercion. Although these points are overlapping, they highlight different problems related to the question of coercion.

1. Legal systems are systems of autonomous co-operative activities, always aiming to be just. Political systems are systems of autonomous activities whose aims depend upon the necessities of the time and the society, including the necessity of controlling human action by force when people fail to live by the rule of law. That is, the political activity extends into a just coercive activity through the police, under limiting stipulations specified by reason, which defines the conditions under which one can infer law not to exist.

2. The conditions under which reasoning cannot take place are also the conditions under which law cannot exist. Under such conditions, however, a political system (such as the dictatorial or totalitarian or martial system) can exist. This implies that whereas a legal system is epistemologically self-validating in the sense that its justification calls for reasoning and the possibility of reasoning requires a legal system (i.e. it is transcendentally justified), the political system is not self-validating. Its justification requires utilitarian grounds (one of which, as we saw, is the prevention of further injustice by using coercive means). Since a political system is not self-validating and since coercive activity is a function of the state, it follows that coercive activity will always stand in need of moral (legal) justification.

3. The legal system aims at an absolute value, justice; it's fundamental principles are synthetic a priori propositions while political systems function according to conventions, depending on social

needs; moreover their foundational principles are analytic. This entails that while political systems, being conventional, can greatly vary in their structure and function from nation to nation, all legal systems must be alike in their essential features and purposes; and as different legal systems develop and mature they will all turn out to be alike. However since coercion is a function of the political system it follows that the methods and types of coercion can vary greatly from place to place and at different times.

4. The legal system being transcendentally and metaphysically justified, independently of all other systems, and also being the only normative system which provides the conditions for the best of all normatively possible worlds, is the only system which can provide grounds for the existence of all other systems. All other normative systems (including the political one) are authorized to exist and work by the legal system. They are legal and hence justifiable only in so far as they exist and act within the limits of such authorization. In concrete terms this means that whereas the judge is authorized to do what he does on the basis of human reason, politicians and their coercive extensions, namely policemen, soldiers and other similar people, are authorized by the legal system to do only what they ought to do according to the legal system.

Having purified the legal system of some of the elements which in fact belong to the political system, we can proceed to state in exact terms the conditions under which the political system may use coercion through its instruments designed for this end.

a) A legal system may hand over a person to a political system if the courts find that a person has acted contrary to the duties that he has towards creating and sustaining the normatively best possible world. The conditions under which some basic duty towards the normatively best world can be taken to have been violated are described in the criminal law of a legal system. (This issue will be discussed in detail while discussing the grounds for the individuation of laws). In such a case of violation the agents of the political system use coercion to confine the criminal's or the deviant's existence in the normatively possible world, either partly or totally. (That is, they can put him in jail, in a reformatory school, on parole, etc.).

b) Two or more people may have to be coerced because the court did not succeed in reconciling the aims of their activities with the ultimate set of legal ideals, i.e. when the court did not succeed in negotiating and settling the issues such that the activities of the disputants would be in conformity to the laws of freedom.

c) Someone may have to be coerced because the law, though rational, was not understood by the agent's irrational will. The limiting case is when a person is grossly irrational, i.e. insane. But in such a case it would first have to be argued and justified in the court that the law is indeed rational, and that it is the person who is in fact irrational.

In all these three cases the issue is handed over to the political authority which may or may not set the police on the person or a group and which may or may not bring them to justice. But even if it is successful in doing so, in every case the coercive activity is not part of the law, but always its failure or absence. The law itself does not imply coercion nor does it exist on such a basis, one follows the law because it is in conformity with, or at least does not violate, the dictates of reason.

Since the only reason why any legal system allows a person to be coerced by the political system is that the legal system must continue to provide the conditions for the best possible world for all its members, the *limits* to which such coercion can be justified as reasonable follows deductively and becomes self-evident. The legal system can authorize the agents of the political system to use coercion only in ways and to the extent which is necessary for sustaining the legal system. That is, the political authorities are justified in using only the minimum amount of coercion which is necessary to maintain the possibility of the legal system. Any coercion which is beyond this limit or which is not related to maintaining a legal order is unjustified and is violence.

In distinguishing between legal and political systems and in arguing that the political institution and not law is coercive, I do not intend to say that coercion is all that there is to the function of the political system. It has indeed various other functions, some of which will be discussed later. But here it has been necessary to focus on only the coercive aspect of the idea of the state, since it is this aspect that is often mistakenly described as belonging to the idea of law.

Having distinguished the legal system from a coercive system and having noted that the idea of law is purely the idea of external morality, it becomes possible to clarify and resolve a basic problem that has often been posed for legal theory.

Theorists who equate the legal system with the coercive system are naturally puzzled when they find a system which claims to be a legal system but which does not have efficient (or even inefficient) coercive measures to regulate those who violate the law. Such is the case with international law.

The basis on which a legal system is built and sustained, as we have seen and as we shall see in detail further, is very different from that of a coercive system; the latter is only a substitute for the legal system, it is not the legal system itself. Hence if a legal system does not have an efficient substitute it follows that the political system which substitutes coercion for law is either not well organized or is inefficient. It does not follow that the legal system is not a legal system on the grounds that it cannot coerce efficiently.

The problem of substitution arises in different ways for every level of legal jurisdiction. The type of coercive system that can be substituted for law at the municipal level is different from the type that is needed at the national level. These two are different again from the type of coercive system that can be substituted for law at the international level. This is so because the political system functions differently at each of these levels. However the nature, the structure and the basic principles of the legal system are the same whether at the level of an isolated community on some unknown island or at the international level.

The theory by which international law, or any level of law for that matter, is to be explained is the same at each level. *The problems inherent in the substitution of coercion for law are what make each level of law different.* The political problems appear at each level in different ways. There is no conflict between different levels of law, in so far as their nature and functions are concerned. Hence we do not need different theories to explain their basic principles. However we do need different political theories to solve the political problem of coercing people so as to provide the possibility of maintaining a legal system. The limits of coercion, even at the international level, would once again be defined and regulated by the same basic principles of law.

Since the criteria by which the legality of a coercive system at every level is appraised is provided by these basic principles of law, it becomes a matter of utmost importance to be clear about the first principles. I turn now to an analysis of these normatively synthetic a priori propositions of reason which apply to practice.

IV THE MORAL PROPOSITIONS OF PURE PRACTICAL REASON

Kant often writes about the 'supreme' moral principle—the Categorical Imperative—as though this formulation contained the key to understanding the whole of morality. It is the Categorical Imperative which has the all-important place not only in his moral theory but subsequently also in his legal theory. The ensuing literature on his moral theory has naturally centred mostly around the principle of universality.[19]

However in the *Groundwork* itself Kant not only provides us with five different moral principles, in 'Review of the Formulae' he also tells us that all maxims have a *form*, a *matter* and a *complete determination*, and that a moral principle cannot be comprehended until all three aspects have been considered. The formula of the *form* is: 'Maxims must be chosen as if they had to hold as universal laws of nature', the formula of the *matter* is: 'A rational being as by his very nature an end and consequently an end in himself, must serve for every maxim as a condition, limiting all merely relative and arbitrary ends'; and the formula of *complete determination* is: 'All maxims proceeding from our own making of law ought to harmonize with a possible kingdom of ends as a kingdom of nature.'[20]

He also tells us that the progression (in legislating a maxim) may be said to take place through the *unity* of the form of the will (its universality), through the *multiplicity* of the matter (its objects—i.e. its ends); and through the *totality* or completeness of its system of ends.[21]

If the form, matter and complete determination are essential for every maxim, and if progression takes place through unity, multiplicity and totality, which Kant's first *Critique* clearly argues it must,[22] then it follows that we must pay a far greater attention to this complexity in considering moral principles than to Kant's frequent assertion that only the Categorical Imperative is the supreme moral principle. On these grounds the Categorical Imperative will only provide us with the mere 'unity of the form of the will.' To know this is still to know very little about the maxim, we must also consider its matter and complete determination besides what is involved in its progression.

Since Kant thinks that the Categorical Imperative is the only supreme moral principle, it is only this principle of universalization which he applies to both ethics and law. In law the universalization principle turns up not only in the definition of justice—as principles consistent with the freedom of the will of all,[23] but also in the consideration about publicity of legal forms—all laws must be known by all so that each person can act freely upon them.[24] However if Kant's arguments in the *Groundwork* and in the first *Critique* about the maxims' form, matter and determination on the one hand, and their unity, multiplicity and totality on the other are correct, then it follows that one must not only apply the universalization principle to law and ethics but that all other principles must also be so applied. It also follows that the Categorical Imperative is not the only synthetic a priori proposition, all other basic principles of morality are also synthetic a priori propositions of pure practical reason. Of course since the modes of legislation in law and in ethics are different, these propositions will apply differently in law and in ethics. We will subsequently see how these different propositions apply to law, but first it will be necessary to present and discuss them.

One reason why Kant chose to apply the universalization formula to law and ethics and to neglect the others seems to be due to the fact that he (mistakenly) thought that the various formulations of the moral laws that he had presented were merely different ways of saying the same thing. He seems to clearly imply this when he reviews his own formulae.[25] He also tells us that the difference between the various moral principles as he outlined them are only 'subjective ... intended to bring an idea of reason nearer to intuition (by means of a certain analogy) and thereby nearer to feeling.'[26]

In assuming that the various moral principles are only different formulations of the same Categorical Imperative Kant seems to be clearly mistaken. All these formulae seem to me to be making different points, each of which is 'supreme' and necessary in its own way. In what follows I shall briefly attempt to show the distinctive relevance of these formulae, even though Kant did not see them in this way. It may perhaps be argued that Kant's formulation of the laws of freedom is not the best expression of the propositions of pure practical reason. I will not try to improve upon them here in any way. For the purposes of this work I shall present and discuss them in the form and in the terms that Kant presented them.

As discussed in Section I, at a deeper transcendental level the legal enterprise seeks to solve the problem of the One and the many' in the noumenal realm through practical reason. Such an enterprise entails the resolution of many normatively incompatible possible systems into one best of all normatively possible world. The formula of universal law: 'Act only on that maxim through which you can at the same time will that it should become a universal law',[27] provides us with the formal criterion according to which such a resolution, from many to one, can be affected. If a universal law is pervasive it can cut through all different normative systems and apply in all of them. Now if all the laws were universal, all the normative systems would be alike in their form, although they might be different in their actual content. There will thus be a formal 'identity of the indiscernibles'. Since all the laws will be universal it will not be possible to discern the normative systems formally. Thus formally there will be only one normatively possible world.

Human beings belong both to the factually possible and the normatively possible worlds. They belong to the factually possible world because they are embodied beings and they belong to the normatively possible world because they have free will and can act autonomously. Or as Kant would have it, the human self belongs to the phenomenal world as the empirical self but as the non-empirical self (what Kant called the transcendental self) the human self belongs to the noumenal realm. Although we cannot decide how the processes and things should be *in* the factual world since we cannot act *in* it, we can nonetheless act *on* such a world to create artifacts which then belong to the normatively possible world. Since we cannot act in the factually possible world we may at best act *as if* we can. The moral advantage in doing this is that since the factually possible world has already resolved itself into one world and thus made all its laws universal, if we emulate such a world we would be making all our norms universal. The factually possible world thus presents itself as an ideal model, but only in so far as all its laws are universally quantified. Since we cannot act in it, Kant tells us: 'Act *as if* the maxim of your action were to become through your will a universal law of nature.'[28] The laws of nature are universal, hence the only way that we can act *as if* our maxims are such laws would be when they are universalizable.

In the normatively possible world, however, where we can certainly act, the question of acting *as if* does not arise. We have therefore: 'So act that your will can regard itself as making universal laws through its maxims.'[29] This formula concerns our actions only in the normative or the noumenal realm, hence it is not the same as the previous one.

The three mentioned moral formulae thus make three different points and are relevant in distinct ways. However as yet they only provide us with the *form* of the maxim which can bring about a legal progression towards *unity*. We have still to consider the progression towards *multiplicity* and *complete determination*.

In the normatively possible world individual human beings are not only autonomous agents but also members of a community. Hence pure practical reason in concrete contexts must not only determine what each *individual* ought to do as an autonomous being but also what he ought to do as a *member* of a community. Pure practical reason must thus necessarily provide two different sorts of synthetic a priori propositions which can determine the agent's will: one which applies to him as an individual and the other which applies to him as a member. Kant presents the synthetic a priori formula, which concerns the human being as an individual autonomous will, as: 'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.'[30]

The synthetic a priori proposition which concerns the individual as a member of a community is formulated by Kant as: 'So act as if you were through your maxim a law making *member* of a kingdom of ends.'[31]

These two formulae provide the conditions for what Kant calls a progression towards multiplicity and totality of maxims, respectively.

Kant's Categorical Imperative cannot by itself form the basis for law or ethics for the obvious reason that every act can be described in various ways from different perpectives. The principles one wishes to universalize as law will depend upon which description of the act one takes to be expressing the maxim. The Kingdom of Ends principle, however, avoids the problem of treating each maxim in isolation from other rules. It asks us to work out an ideal system of rules such that the matrix for considering each proposed maxim as a universal law is the set of all other rules that every member in the Kingdom of Ends would necessarily accept and in which each person will be regarded as an end in himself. In considering maxims in this way their *matter*, and their relation to the rest of the system (i.e. their *complete determination*) would also have been taken into account. One would not have merely considered their *form*.

As it turns out then the formula of the universal law is the criterion for the *form* of the maxim; the formula of the End in Itself is the criterion for the *matter* of the maxim from the individual's point of view; and the formula of the Kingdom of Ends is the criterion for the *complete determination* of the maxim from the community's point of view. All three formulae are synthetic a priori propositions which are necessarily involved in any moral legislation.

Since morality has two aspects, internal and external, all three propositions will apply both to ethics and law, but they will function differently in each since the modes of legislation and the duties involved in law and ethics are different. Since my interest in this work is in legal legislation I shall discuss only this aspect of moral legislation. Ethical legislation requires separate treatment.

V THE LEGAL PROPOSITIONS OF PURE PRACTICAL REASON

Law is concerned with optimizing and safeguarding human freedom. The Kingdom of Ends principle is intended to emphasize the optimization of freedom of action; it is hence the most apt principle for describing the basis on which laws can be legislated.

The notion of a kingdom is the notion of a community. (Kant seems to have used the term in the sense of a 'realm'. Its English translation as 'kingdom' is misleading since it suggests political ideas, such as those related to monarchy, which Kant evidently did not intend to imply. I shall, hence, hereafter use the more neutral term 'Community of Ends' interchangeably with the expression 'Kingdom of Ends', wherever necessary. By the use of this expression, however, I do not intend to imply anything other than what

Kant meant by 'Kingdom of Ends'.) What Kant meant by Kingdom of Ends, as he tells us in the *Groundwork*, is: 'A systematic union of different rational beings under common laws.'[32]

Although Kant does not use the term 'Kingdom' in any significant way outside the *Groundwork*, the sense that is given to it here finds frequent use in all other works. Thus Kant sometimes uses the term 'commonwealth' in a similar sense;[33] in other works he describes the 'Ideal State'. To obtain a complete picture of the Kingdom of Ends it is thus necessary to take into account not only what Kant says in the *Groundwork* but also what he says elsewhere.

In the light of these wider considerations, to start with, the Kingdom or the Community of Ends can be characterized in the following way. The Community of Ends is a system in which the legislators of laws are bound by the following rules:

(a) Every rule willed by the legislator(s) must be such that *any* and *every* individual can act in conformity to it when he wants or needs to do so.
(b) Every rule willed by the legislator(s) must take into account that each member of the community is an end in himself.
(c) Every rule willed by the legislator(s) must make possible the use of every *autonomous* member by other members, but it must *never* make possible the use of *any* member *solely* as a means for the ends of other members.

The above propositions are principles of pure practical reason in their concrete application to law, and hence foundational principles for all legal systems. These propositions generate other related propositions which we will subsequently discuss.

The idea of such a Community of Ends is entirely the idea of a set of ideals. It does not depend upon any factual description, except the assertion that there are rational agents capable of being conceived as ends in themselves.

We might ask why it is necessary to accept the model of the Community of Ends? Is it not itself an arbitrary a priori moral assumption? To pose this question is, however, to assume a world in which acceptance and rejection are really possible. It is also to assume that propositions must always be considered, and those which are acceptable by some criteria should be accepted while the others should be rejected. This is to demand optimal conditions for acceptance and rejection.

What the Community of Ends model provides is the social condition for optimizing the possibilities for acceptance and rejection themselves. Actually it supposes precisely a system in which choices are made by free decision and not by force or by fiat. The denial of the existence of ends in themselves and the denial of their equality is precisely the assertion that some propositions (i.e. those which distinguish arbitrarily between some rational agents and others) should be accepted by force or by fiat. The Community of Ends model thus provides the optimal and the only condition in which any and every question can be asked, considered and answered, including the above question concerning the Community of Ends.

Being able to reason and make the right decision in accepting or rejecting propositions is one of the basic ideas of the Community of Ends model. The ability to make such decisions, however, requires knowledge of all the relevant possibilities. The Community of Ends principles thus prohibit any arbitrary limitation on the availability of knowledge. Such legal ideas as the freedom of the press, freedom of speech, access to education (which are instrumental in the acquisition of knowledge) and being able to make the right decision, thus follow directly from the Community of Ends principles.

Since these principles are synthetic a priori they must be accepted as true and binding prior to the experience which leads to the actual acceptance or rejection of specific propositions. They tell us a priori what the limits of the legal system are, namely those conditions under which a Community of Ends can exist, and also what the legal system must contain, namely the conditions for the Community of Ends. They also specify the priority of the principles within the legal system. All those principles which are essential to the Community of Ends will take precedence, they will be the supreme criteria for judgement, which include the various fundamental legal freedoms and rights. These will be followed by all those principles which enhance the possibility for a Community of Ends. Third preference will be given to those legal principles which do not at least prohibit the possibility of a Community of Ends. Such a classification of legal propositions allows for legislative openness, with a realm of permissible decisions, which is necessary for all legal systems. It also gives a notion of an overall systematic aim to the legal system which can give a sense to consistency in application.

The fact that the Community of Ends model of a legal system, as characterized in its richer and more elaborated form here, is implicit in Kant's description of a legal society would become evident if one were to take into account not only what he had to say about law in the *Metaphysik der Sitten* but also in *Theory and Practice*. There, in criticizing Hobbes, he tells us:

> The civil state, viewed purely as a legal State, is thus based a priori upon the following principles:
> 1. The *freedom* of each member of society as a human being.
> 2. The *equality* of each member with every other member as a subject of the State.
> 3. The *independence* of each member of the community as a citizen.

He continues: 'These principles are not laws given by a State already established, but they are the only laws that make it possible to found a State in accordance with pure rational principles of external human laws as such.'[34] The above three notions of freedom, equality and independence involved in all legal systems thus make three further foundational principles of law related to the Community of Ends principles. They receive a more detailed expression in the *Metaphysik der Sitten*, as:

> The members of such a society (*societas civilis*), that is, of a state, who are united for the purpose of making laws are called *citizens (cives)*. These are three juridical attributes inseparably bound up with the nature of a citizen as such: first, the lawful freedom to obey no law other than one to which he has given his consent, second, the civil equality of having among the people no superior over him except another person whom he has just as much of a moral capacity to bind juridically as the other has to bind him; third, the attribute of civil independence that requires that he owe his existence and support, not to the arbitrary will of another person in the society, but rather to his own rights and powers as a member of the commonwealth (hence his own civil personality may not be represented by another person in matters involving justice and rights).[35]

However Kant does not make it clear how the three notions presented here, those of freedom, equality and independence, relate to his moral theory in general. Nor does he attempt to explain why the civil state *when viewed purely as a legal state* must have these notions. Kant's analysis in the *Theory and Practice* does not make it very clear what is meant by or involved in viewing the civil state as purely a legal state.

Only when we view the notion of the Kingdom of Ends and its relation to the idea of civil society in a richer and larger perspective, as done here, can these three notions be bound together within a conceptual scheme.

In light of this analysis the three notions necessary for the idea of the civil state as a legal state can be shown to be derivable directly as corollaries to the principles of the Community of Ends in the following manner. (Since the three principles are derivable from the Community of Ends principles they become conceptually posterior; however in their moral and legal significance they are just as important as other legal propositions of pure practical reason).

The first principle which guarantees the freedom of each human being follows directly from the idea that each human being is essentially a rational free-willing agent and that the agent's self-realization as a moral agent can only be achieved in so acting. A possible civil state can only become a legal state if the agents in it in fact exercise their freedom and realize themselves as autonomous agents.

The substantive equality of each human being follows from the idea that the essential humanity of each being, his dignity as a moral agent, or as Kant says, his worthiness in being priceless, lies in being an end in himself; and thus for every maxim he serves as a condition which limits all merely relative and arbitrary ends. Procedural equality on the other hand follows from the principle that no person is ever to be treated solely as a means, and also that all laws must be universal. Since law must never treat anyone solely as a means and since it must abstract from individual differences while legislating, it follows that every judge stands in the same formal relation to every person he is judging. That is, the formal procedures by which the judge is to pass a judgement on a person must be the same for all people.

The idea of human independence, however, cannot be derived from Kant's legal theory without marking the radical revision discussed before, namely that law is not coercive. It can be derived from the Community of Ends principles as presented here, however, because this major revision in the idea of law has already been incorporated into these principles.

If law always involves coercion then the independence of each agent to act legally is not absolute. Law must guarantee that everyone may pursue his moral ends in the manner that seems best to him, provided he does not infringe upon other people's independence to pursue their ends. Or, as Kant would have it, law must allow the pursuit of moral ends by each agent so long as he does not become an obstacle to another's right to do whatever can coexist with everyone's freedom under a possible universal law. For the actualization of such an independence it is absolutely necessary that the moral agent not be coerced in any way to do anything, even that which is morally right; for to coerce anyone to do something which is morally right is to disregard his autonomy and dignity. Coercion enters in only to stop the person from doing something which is legally wrong, not to make him act legally or morally, and when coercion does enter in this way it is not the task of law but that of the state to see to it that a minimal amount of coercion, which is authorized to it by law, is used to maintain a legal order.

The formulation of the Community of Ends principles raises various questions for a theory of justice, such as what are the various detailed contents of substantive and procedural equality, what are the various related ways in which independence can be defined, etc. But it must be remembered that the limited task of this work is to specify the theory of law and not to examine a theory of justice. The idea of law and the idea of justice are different though related. They are related by the fact that just conditions are what law is trying to achieve. But then the theory of law, which concerns the idea of law, must tell us which type of social institutions based on which justifications and grounds bring about just conditions. This is distinct from a theory of justice (which concerns the idea of justice) which specifies and justifies the criteria of what constitutes just conditions.

In practice of course no legal system can work without involving a theory of justice, just as it cannot work without involving a theory of the state. But from the point of view of our understanding it is perhaps best to divide the conceptual labour into working, defining and discussing the three ideas separately. This work shall hence not discuss problems in the theory of justice in any detail.

However, it will be necessary at least to point out how problems for a theory of justice arise from the propositions of pure practical reason, problems which are related to law but which need independent analysis in a theory of justice.

The proposition of pure practical reason says that law must make possible the *use* of only *autonomous* members; here arises the first problem for a theory of justice. What criteria define and distinguish the use of an autonomous member from a non-autonomous member? Most theories of justice, I think, would now say that children and the insane cannot be taken to be autonomous members. Law must therefore not make possible their *use* by the community, or at least it should limit it in all necessary ways. Other theories have argued for the use and abuse of all sorts of members on various grounds. Any theory would of course require justification.

Secondly, the principle of the Community of Ends allows that every member *can* be used as a means, but *never* solely as a means to some end. However, since there *has* to be a division of labour in a society, people have to be used as means (although not solely). This has to be done in such a way that the use does not violate the person's dignity. Here arises the second main problem for a theory of justice. It has to find out what sort of use would not violate human dignity. If the use that people make of other members of the community can be compensated in some way such that their original dignity and integrity is retained, then it is evidently the task of a theory of justice to state what such a compensation should be. A theory of justice may thus be divided into the a priori part which specifies the conditions under which just use of a person has been made, and an empirical part which specifies what counts as just compensation. The latter question turns up as an issue in political economics; it evidently belongs equally to what may be called 'juridical economics'. As an example of the issues concerning the first part of a theory of justice one may cite Rawls's *Theory of Justice*;[36] and as an example of the second part of a theory of justice one could mention Marx's *Das Kapital*.[37] I am not of course suggesting that one has to accept Rawls's or Marx's solutions. The aim here is only to make clear that although the principles of the Community of Ends generate problems for both a theory of justice and a theory of law, the nature of these problems is distinct.

Returning to the theory of law then, it will be important to mention in conclusion that since the principles applicable to the Community of Ends as specified here, together with the derivative ideas of equality and independence, form the rational basis for the existence of a legal system, it follows that these basic legal propositions are the ones that constitute the *reality principles* for law. That is, the metaphysical requirements which can make the transcendentally possible legal system actual are specified by these existential conditions. For a possible legal system to be actual these conditions must be satisfied, or conversely the existence of these conditions will actualize a legal system.

These reality or existential conditions tell us that a legal system, or any law in it, cannot be said to really exist if it is found to exist only in books and not in practice. Freedom of speech for example will exist in jurisdiction X if the citizens of X have actually spoken freely and continue to do so. It would be wrong to say that freedom of speech exists in X because it is written in their consititution, although no one has ever actually cared to speak freely. If the citizens of X have not cared to speak freely or have not been allowed to do so for some reason, then it would be false to say that freedom of speech exists as law in X. I shall discuss this issue in detail in the section on the legislative requirements of law.

Since the Community of Ends principle forms the rational basis for the existence of a legal system and since the idea of a Community of Ends is a set of ideals—the only conditions in which every human being can realize his moral ends, it becomes morally obligatory for all of us to work towards such an ideal. We obviously know that at present we are far from the ideal; what do we do in the meantime? We must, as Kant had it, always act *as if* we are members of an existing Kingdom of Ends although for the moment we are not. This is the only way to bring such a kingdom into existence.

The conditions in which we can try to actualize the ideal community is met in a civil society. Hence as Kant and others have argued it is our duty to maintain a civil society. In an actual Kingdom of Ends what a person legislates for himself will also be what the community legislates for the individual. That is, in a civil society which is actually a Kingdom of Ends the division between law and ethics will not exist; in content the two will be the same. Such a synthesis can only be achieved in a civil society, not in a state of nature. Therefore I proceed now to some basic considerations about civil society as it relates to the idea of law. This requires considering civil society both from the point of view of the community and from that of the individual.

VI COMMUNITARIAN REQUIREMENTS OF LEGAL ONTOLOGY

By the communitarian requirements of legal ontology I mean those necessary metaphysical conditions on fulfilment of which a community actually populates the normatively possible world in such a way that it has a legal identity and a defined legal jurisdiction.

The first condition is that a community must define its identity and jurisdiction in a self referential way. The meaning of such a communal legislation is examined and discussed in the first part of what follows (Section VI.i.).

The second requirement is that a community must actually create and sustain the legal system. Some basic principles involved in such a creation and sustenance have already been examined and explained. It remains to be seen now what types of actions actually need to be performed in accordance with these principles to bring about and sustain a legal system—whether we need to contract or merely to consent, or to surrender, etc. The following two sections—Sections VI.ii and VI.iii—examine and discuss this problem. The appropriate conceptual scheme which best characterizes the actions done to create and sustain a legal system are also discussed.

VI.i *Communal Legislation*

When a community legislates laws to itself it determines the course of its collective actions. In terms which Michelet made popular after the French Revolution, collective actions are performed by 'the people.' Communal legislation by the people involves, first, some way of deciding what to do; second, some way of giving effective form to that decision; and third, some way of following it through to see that the form persists long enough to achieve whatever ends are in view.

Thus we have the Indian Constitution which begins with the statement 'We *the people* of India...'; similarly the Americal Constitution reads, 'We *the people* of the United States...'. These are self-referential propositions, the people are referring to themselves and giving a constitution to themselves. If we are to make any sense of such self-referential propositions involved in communal legislation we must assume that some action has actually taken place in making these performative utterances. The entity to which the constitution is given is the people and the giver is the people as well. It becomes necessary therefore to assume that 'the people' refers to something actual. The constitution is a community's most serious and important document, as such its very opening line cannot be untrue or meaningless, referring to nothing and portraying a non-performance.

The uneasiness that many philosophers seem to exhibit in asserting that the notion of the people refers to something actual can be traced to their mistaken metaphysical view that all entities must either be of a natural kind or a nominal kind. As discussed in Part III, legal entities are neither of a natural nor a nominal kind. 'The people' refers to a normative kind. It would hence be wrong to claim that 'the people' does not exist because it cannot be observed like entities of the natural kind, or because it is an abstract entity like those of the nominal kind. The notion of the people is just not available for such observations or analysis. Being a normative kind it is intelligible in terms of norms. Its intension, described by the norms, determines its extension, and the meaning of the term is known to us essentially. That is, we not only know what 'the people' means but also what it means to be the people.

The people is thus an actual entity of a legal system. Which group of persons will constitute a particular people is a question of class membership. The answer is usually provided by the laws of citizenship.

The notion of a community, as Kant's first *Critique* argues, is a category of our understanding. As argued in the last part, in the noumenal realm this category has a different role to play. It does not just inform our understanding, it gives form to our actions so that through their deeds a number of individuals can bring a community into existence and constitute themselves as a people.

Implicit in the notion of the people giving a constitution to itself is the notion of an agency. Since an individual agent *wills* his activities many thinkers, including Rousseau, have been led to discuss the activity of the people as an expression of the 'general will'. Rousseau's concept of the 'general will' is equivocal, it seems to make it both transcendent and empirical.[38] This has naturally led to many controversies. However, in the various discussions of the notion of the 'general will', the real issue behind the notion seems to be lost. The real issue is: in what sence does the people legislate laws to itself? It was this question, too, which Rousseau was trying to answer. The question remains significant independent of his solutions. In what follows I shall attempt to pursue and clarify this question itself rather than discuss Rousseau's answer.

From the point of view of the community the question is: in what sense does the community legislate laws for the individual? From the point of the individual the issue is: in what sense can the autonomous will of an individual be understood as constituting the will of the community?

Since the basic legal propositions, in their application to the concrete instances, provide universal laws, if the individuals act in accordance with such universal legislative laws of freedom a general law will result from their joint decision. This is one sense in which the will of the individuals could be understood as constituting the will of the community. The autonomy of man or man as an end in himself would further mean that a legal norm possesses truly legitimate binding obligation only if it has been created by the free participation of all those who are subject to it. From the point of view of the community, however, only within the framework of the principles of the Community of Ends can a free decision be realized as an expression by autonomous agents legislating for the will of all.

The will of all, i.e. the will of the community, is thus not the name of one more will in addition to the various individual wills. It only specifies a general *Condition* in which a particular maxim can be taken to be legislated, and to be consistent with the freedom of all individual wills.

The specification of the condition which is expressed in the proposition: 'We the people ... give this Constitution to ourselves', actually contains two self references: 'we' and 'this'. It therefore relates a people to a legal system. One may ask why it is necessary to explicitly express the relation of a legal system to a people, can it not be simply assumed? Whether it can be assumed or not is not a legal matter, it is a matter of historical necessities. For what the proposition in fact achieves is a re-locaton of authority by distinguishing 'we' people from other people. The creation of certain aspects of the Indian or the American legal system, for example, required reconstitution of the people in whom the constitutional authority could be finally vested It did not necessitate changing all the laws. Many Indian laws, for example, are still of British origin or those legislated by the British in India. In the British legal system, where the allocation of authority has not required redefining the people, such a self-referential constitution giving an affirmative proposition is not necessary.

Thus, as it turns out, the *grundnorm*, which Kelsen made the key explanatory concept in his theory, has other roles than those emphasized by him. He seems to have observed its conceptual aspect only, namely that it makes a system possible (and in this too, as I have pointed out, he is mistaken, it makes a system materially possible not transcendentally possible). Kelsen seems to overlook the historical significance of the norm. It is not as if the Indian legal system did not exist before the enactment of the constitution. Hindu law—governing family structures and inheritance, for example, has existed since ancient times. In its changing form it has governed Indian social life before, through and after British rule. The enactment of the constitution only reallocated the authority to a different set of people to further legislate and amend Hindu law. It is thus wrong to believe that the *grundnorm* giving a constitution to the people can explain the basis of a legal system; such a norm is more of historical than legal significance. Being a general proposition for all normative systems in which the authority for legislation, recognition and amendment of rules is to be specified, its employment in the normative system of law may come about only when either a people reconstitute themselves or when a change in the allocation of authority is necessitated. Evidently, there can be other conventional ways of expressing the manner in which the reconstitution of people and authority are to be specified.

Given that the constitution-giving *grundnorm* is not a true explanation for the genesis of a legal system, what sort of explanation must one seek? I proceed now to a discussion of this issue.

VI. ii *The Communal Genesis of Law*

I shall consider here the idea of a civil society in its legal aspect only. In itself the notion is very complex; it would include within itself not only political and economic institutions but also others such as religious, educational and recreational institutions.

The main aim of this section is to show that the notion of a pre-legal society is a myth. The difference has always been one of degree and never of kind. There can neither be a conceptual nor an empirical discontinuity in so far as evolution of societies as legal societies is concerned. A theory which portrays sudden leaps into legality cannot be describing the truth.

If law is based on practical reason then sudden leaps in the social structure would involve sudden leaps in man's practical reason and nature. The belief that the evolution of man's practical reason has been discontinuous seems to me to be a far-fetched theory. It seems more plausible to believe that the evolution of human reason and nature has been gradual and continuous. However in what follows I will not attempt to develop this thesis from the point of view of human reason, but limit the work to a criticism of those theories which portray discontinuity in social evolution from a pre-legal to a legal state. This primary task is more important at this stage. Towards the end of this section I will suggest what sorts of concepts and theories are appropriate. This will be done in a rudimentary way.

Since the legal system is the only system which provides the conditions for the best normatively possible world, it is the most fundamental system of civil society; and as argued before, it is the one which justifies and regulates all other normative systems of civil society. Further, law justifies its own existence and derives its authority to regulate human behaviour from human reason and not from human will. Since law is the protector and the justifier of all other normative systems it follows on this account that we need the legal system for a civil society; and it is not the case that we need a civil society first in order later to have a legal system. That is, we have a legal system *so that* we may have a civil society; and it is wrong to believe that we have a civil society *so that* we may have a legal system.

Now, simple as this distinction may seem at first sight, it has not only been the grounds for a great deal of confusion in legal theory but, as I shall try to show, it has also led many philosophers to theorize wrongly about the justification for a civil society in so far as it concerns law.

This distinction distinguishes Locke and Hobbes from Kant. Locke and Hobbes seem to have held the second view and believed that civil society is needed and justified on the grounds that only in it can we have a legal system. Hobbes argued that civil society was to be preferred to the state of nature for reasons of enlightened egoism. Locke argued that it was preferable on grounds of utility and the possibility of legal punishment. Kant, however, found both of these theories suspect on both empirical and moral grounds. Scientifically, he argued, the theories are really fantasies of a priori sociology, for how can we ever test through experiments whether people are happier in a civil society or in a state of nature? Moreover Kant made the point that no amout of happiness or self-interest could establish the moral worth of a civil society unless it could also be shown that the institutions were compatible with the demands of freedom and justice. Kant is thus in agreement with the first option, namely that we have a legal system because it is good in itself and because as such it provides the conditions for a civil society. In what follows I shall examine the two options in some detail.

Essentially Locke's justification for a civil society is grounded in his two basic beliefs: first that man has a natural right to punish others, and second that such punishment can be actualized only in a civil society. The crux of his theory is best expressed in his own words:

> Man being born, as has been proved, with a Title to perfect Freedom, and an uncontrouled enjoyment of all the Right and Privileges of the Law of Nature, equally with any other Man, or Number of Men in the World, hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men; but to judge of, and punish the breaches of that Law in others, as he is perswaded the Offence deserves, even with Death it self, in Crimes where the heinousness of the Fact, in his Opinion, requires it. But because no *Political Society* can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto punish the Offences of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power, resign'd it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it. And thus all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such Penalties as the Law has established: Whereby it is easie to discern who are, and who are not, in *Political Society* together. Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, *are in Civil Society* one with another: but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect *state of nature*.[39]

Besides the quoted passage (87) above, other passages such as 89, 95, 96, 97, also clearly bring out Locke's view that we need a legal system in a civil society so that we may protect the rights that we already have.

Thus, Locke's justification for a passage from a pre-legal to a legal order in a civil society is his claim that we provisionally give up or entrust to the government the natural right to punish others and to own some property. We could of course punish each other in a state of nature, but this is not efficient or practical. In order to secure a more efficient practice of punishment or ownership, we entrust this power to the government in the civil society. Hence we need a civil society first so that it can create a legal system in which all offenders can be efficiently punished.[40]

Now whether or not we accept Kant's criticism that a fantastic a priori sociology is being assumed here, there is a serious conceptual difficulty in Locke's theory which needs an independent resolution.

Punishment, as Hobbes has also noted, is paradigmatically a legalistic notion, and what will constitute a just punishment (as opposed to mere violence or use of force) cannot be established without recourse to a legal system in a civil society.[41] Hence the belief that we have a natural *right to punish* is unintelligible in a pre-civil, pre-legal society. In such a society no one would know what it means to punish as opposed to merely using force, because the ability to distinguish punishment from violence itself depends upon the possibility of distinguishing what is legal from what is illegal. Such a possibility evidently does not obtain in a pre-legal society. Punishment demands as a minimum three conditions: a system of rules, a legitimate authority to legislate these rules, and another legitimate authority to enforce sanctions for breaches of these rules. These conditions distinguish the mere infliction of social harm from punishment. These conditions are not present in Locke's pre-civil society, hence the notion of punishment is unintelligible. As a matter of fact, as we have seen, coercion is used only when the legal system is unable to make a person act rationally. But in such a situation, evidently, the existence of the legal system is presupposed. What I have said about the notion of punishment may also be said about the notion of right, namely that it is a legal notion, intelligible only within the schemes of a given legal order, not prior to it. Locke's theory about the move from a pre-legal to a legal-state is thus not only empirically but also conceptually problematic from the very beginning.[42]

Hobbes explains the origin of civil society in terms of a conception of man as egoistic and anti-social. He explains why men move from the state of nature (a pre-legal state) into civil society by identifying what causes them to do so. In the state of nature men are essentially at war with each other. Since they are selfish and anti-social they are indifferent to the concerns of each other. But to pursue his interests a man must have the power to prevent others from harming him. The consequence of all this is that life is miserable, short and brutish in the state of nature. Men move into a civil society, according to Hobbes, because reason tells them that peace and tranquillity are necessary for pursuing their own interests, and experience shows that this is impossible in the state of nature. The people give up their individual powers and contract into a commonwealth, in which the sovereign, who may be one person or an assembly of persons, has all the powers. Man then regulates civil society through authoritative coercion (which is law in this definition). The sovereign is not bound by the contractual obligations that the rest of the people are, he has all the power.[43]

Kant thinks that the Hobbesian theory is wrong on two grounds. First it gives the wrong kind of advice because it tells statesmen and citizens alike that the only thing men respect is power; and second the question of whether a government has a right to coerce becomes whether it has the power to do so. Kant tells us, 'Once we are talking not of rights but of power only, the people may try their own power and jeopardize every legal constitution.'[44]

However what Kant does not notice is that just as with Locke, there are some basic conceptual problems in the Hobbesian theory which likewise make it theoretically problematic. The question whether the Hobbesian theory is historically true comes only later.

If people are really selfish and anti-social in the state of nature, how can they ever get out of it? For the very act of coming together to unite in a *pactum sociale* requires unselfishness and sociability. The very possibility of a social contract demands that men be willing to reason together and behave morally so that they may be able to bargain. Contracting is not a morally neutral activity which may be done if men are said to behave as they do in the state of nature; contracting would be impossible and the move from a pre-civil to a civil society could never occur. It would simply be impossible to win everyone's trust and lodge it in one sovereign when, in the first place, no one had any grounds to trust anyone else. Even physically it would be impossible to contract because each person would not only fear the other's presence but also in the event that they did finally manage to sit together, they would have no grounds for believing the truth that the contract would be kept by all or any once it had been made. The notion of contract, like the notion of punishment, is essentially a legal notion. Only after the legal system (of even some simple kind) has come into existence does it make any sense to talk about contract or punishment. The very possibility of contracting or punishing presupposes some sort of a legal system.

Kant's own position on the relationship of the notion of contracting to the genesis of civil society is not very clear. Although Kant does believe that the notion of contract is a legal one and hence cannot be used to explain the existence of law, he also wants somehow to retain the belief that it is still a necessary notion for law. He tells us:

> Here we have an original contract on which alone a civil and thus consistently legal constitution among men can be based and a community established.
>
> Yet this contract, which we call *contractus originarius* or *pactum sociale*, as the coalition of every particular and private will within a people into a common public will for purposes of purely legal legislation, need by no means to be presupposed as a fact. It is not necessary first to demonstrate historically, so to speak, that a people, whose rights and duties we have inherited, must really have performed such an act *at some time* and must have left us, by word of mouth or in writing, some reliable news or instrument of it, before we are to consider ourselves bound by an existing civil constitution. It is rather a *mere idea* of reason, albeit one with indubitable practical reality, obligating every lawmaker to frame his laws so that they *might* have come from the united will of an entire people, and to regard any subject who would be a citizen as if he had joined in voting for such a will. For this is the touchstone of the legitimacy of all public law. If a law is so framed that all the people *could not possibly* give it their consent—as, for example, a law granting the hereditary *privilege of master status* to a certain class of *subject*—the law is unjust; but if it is *at all possible* that a people might agree on it, then the people's duty is to look upon the law as just, even assuming that their present situation or the tenor of their present way of thinking were such that, if consulted, they would probably refuse to agree.[46]

The interpretation that Kant gives to this 'idea of reason' (i.e. the social contract) is in fact none other than his universalization principle. What he is telling us once again in the above paragraph is that public law is legitimate when it has the consent or the will of all those who are governed, i.e. when it is universal. The universalization principle has already been justified by Kant as an a priori principle of practical reason. The notion of social contract as interpreted here does not add anything more to the criterion. In other words Kant can be taken to have shown us that no contractarian theory is required to explain the origins of law in a civil society, and at best it can function only as a universalization principle.

One might ask: if Kant has shown that law derives its legitimacy from reason and that it can be justified as external morality independently of any historical account, why is he still entertaining the notion of social contract even as a helpful 'idea of reason'?

It seems to me that in giving some attention to the notion of social contract Kant is still labouring under not only a central misconception which limits his inquiry but also under something which can be considered to be a dogma of the whole of the Western tradition, a misunderstanding which must certainly have its roots deep in the Western psyche for it surfaces every now and then, including in our own time in Rawls' work. May be what we notice here is a historical phenomenon that has been psychologically reversed. The effect has been taken to be the cause. The roots of this psychic reversal could possibly be traced back all the way to the Moses, the David or the Deucalion covenants in the Hebrew and Greek experiences. These covenants were possible after the wars, when some sort of peace and harmony had already emerged. Creating covenants and contracts requires some minimal civil conditions. It is a result of peace and friendship and not their cause. What seems to have remained in the forefront of the Western psyche is a memory of the covenant, an important event which was later assumed to be the cause of peace and harmony instead of its result. In our own time we notice that treaties are signed between nations *after* there is some sort of civil relationship between them, not while they are at war with each other. The treaty is not the cause of the civil relation or friendship but its effect. Of course once the treaty has been signed, further friendship and civil relations may ensue. This does not mean that historically or conceptually the treaty, covenant or contract was the prior ground for the existence of the civil relationship. Legal ways of mutual behaviour give rise to the possibilities of treaty, contract and other mutual bindings, the legal way of behaving is not itself grounded in these. Law is the condition for a civil society, we do not contract into a civil society so that we may have a legal system.

The falsity of any attempt to explain or justify civil society and the juridical system in it by a contractarian thesis can be perceived even on a *prima facie* preview of the working and elements of the law of contracts.

Pollock defined contract as 'a promise or a set of promises which law will enforce'.[46] Later the notion finds a more precise articulation in Sutton and Shannon as 'an agreement which law regards as conferring personal rights and imposing personal obligations, which it will protect and enforce on parties to the agreement.'[47] Clearly, both these definitions show that the practice of law is presupposed in the practice of contracting. In any case it will be best to discuss the issue in detail before this conclusion can be asserted with emphasis.

Contract needs to be distinguished from some related notions. To start with, the liability for breach of contract and the liability in tort is distinguished by the fact that i) the duties in tort are primarily fixed by the law while in contract they are fixed by the parties themselves; ii) in tort the duty is towards persons generally while in contract it is towards some specific, designated person(s).[48] Contract is distinguished from trust by the fact that whereas contract creates right *in personam*, trust creates equitable rights, indistinguishable in practice from rights *in rem*.[49] This property of creating rights *in personam* further distinguishes contracts from conveyance of property, etc. which too create rights *in rem*. Contract is also distinguished from exchange in general, which only involves the barter of goods for goods, because of the fact that promises requiring mutual transfer are not involved and nothing further remains to be done. (Only when collateral promises, such as warranties, accompany exchange do they become contractual). According to this account, then, contracts are collateral promises creating further expectations and rights *in personam*, the liability for the breach of which is mutually fixed by the parties.

Perhaps the most widely accepted legal definition of contract is the one that appears in Section I of the *Restatement of Contracts*: 'A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as duty.'[50]

The definitions given above make it obvious that law is not legitimized by any contract but that we need law first so as to legitimize any contract, or even to *recognize* some set of actions as being an instance of contract.

Lawyers usually define the essential components of a valid contract as consisting of: i) Offer and acceptance ii) Consideration iii) Competent parties iv) Genuine consent v) Legal purpose. (There are different ways of ordering the elements in Common Law and in Civil Law. However, in whatever priority they are arranged, these five elements are common to most of them. The difference of approach, but the similarity of issues, can be seen, for example, by comparing 'Chesire and Fifoot's Law of Contracts'[51] and 'Chitty on Contract: General Principles').[52]

These five elements in fact state the necessary conditions under which a valid contract can be taken to exist. They can be spelt out as follows:

1. There must be a genuine offer by one party and a genuine acceptance by the other. Not any action can be taken to be an offer or an acceptance. The conditions for what would constitute a genuine offer and acceptance are spelt out beforehand in detail in law.
2. There must be due Consideration. Consideration is a theoretical term in law which stands for the recompense given by the party contracting to the other. The classic statement describing Consideration can be taken to be that which was presented in *Curie vs. Misa*: 'A valuable Consideration in the sense of law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsiblity given, suffered, or undertaken by the other.'[53] A due Consideration is one which is real and legal. One may not, for example, enter into a contract which involves promising a bribe to a public official. What constitutes a real Consideration or an illegal Consideration is usually spelt out first in detail in law.
3. The parties who are contracting must be competent. For example they may not be minors or insane persons. What constitutes a competent party is once again defined in law.
4. Genuine consent must be given by both parties to the contents of the contract. They must not, for instance, be under compulsion or in a confused state of mind due to the influence of drugs, or in ignorance or the relevant facts. What constitutes genuine consent is defined in law.

5. The purpose for which the contract is being made should not violate the systematic aims of law. For example one may not contract to kill someone.

On the basis of the ways in which these five conditions are satisfied, lawyers distinguish between different types of contracts such as 'simple contracts', 'contracts under seal', etc. However for the purpose here it is not necessary to discuss different types of contracts. What is important is to notice the relevant conceptual relation, between the law in general and the Law of Contracts in particular, revealed by the five necessary conditions. It is revealed that for each necessary principle of the Law of Contract, the law in general first spells out the meaning and the application of each essential notion involved in the principles. That is, it shows that the knowledge of what 'contract' means cannot be obtained without a detailed knowledge of law. For a valid contract to exist law has to first define all the conditions.

If the notion of a contract becomes intelligible only if some legal system is first defined, then one cannot explain law in terms of contractual deeds. The validity of a legal system cannot be derived, as philosophers have attempted to show, from the validity of an actual or a hypothetical contract; but, as lawyers have rightly seen, the validity of a contract must be derived from the rules of a valid legal system. The fact that the idea of law is conceptually prior to the idea of a contract becomes totally evident if one peruses the lengthy and important portions—in Pollock's, Chitty's, Sutton's or any other standard text book on the Laws of Contract—that are devoted to the notion of *illegal* contracts. Clearly, discussing what is an *illegal* contract would be impossible if one did not independently know beforehand what it means to behave legally.

Contracting, as most writers on this aspect of the law have emphasized, is a very useful legal device to ensure a certainty of actions which may not be possible otherwise. Contracts guarantee a regularity of deeds and expectations on the basis of which collaborative social actions become easier to execute. It thus has a useful role once the legal system has come into existence, not prior to it.

It will be important to emphasize here, once again, that law does not *force* us to keep our contracts. Pollock's, Sutton's and other definitions of contract which assert that law *enforces* the keeping of contracts would thus stand in need of revision. Their definition embodies the general confusion that law, including the law of contracts, is coercive. Since law does not force people to keep their contracts (promises), it seeks to find the best remedies when conflicts arise. In fact a closer look at actual cases would reveal that litigations involving breaches of contract do not always consist of setting armed men after people, but in finding reasonable remedies which will satisfy the needs of both parties and which will be equitable, given that the promises are not being kept or that they cannot be kept for various reasons. Since contracts are utilitarian devices, law always seeks to find solutions of maximal utility such that they do not violate the systematic aims and ideals of law. It is hence constantly concerned about the consequences that arise when contracts cannot be kept rather than with any so called 'enforcement of the morality of promise keeping'. Law attempts to see to it that the consequences are in conformity with its basic principles. Since utility is the basic criterion for judging the practicability of a contract (although not its legality), it can often happen that it is more reasonable to break a contract than to keep it. Such a situation can arise when a person, after making a contract, realizes or discovers that a greater loss or harm will result from keeping the contract than from breaking it; for instance if a person who has contracted to build a house for someone at a particular place for a set price, discovers on starting the work that the ground is solid rock and that he would have to invest twice as much on laying the foundation as he could earn for the job, then the law will recognize his difficulties, it will seek a reasonable compensation rather than attempt to force the contractor to keep his promise.

If the idea of law is prior to that of the contract and if the law is not coercive it clearly follows that we must theorize about the grounds for a civil society in a very different way than any contractarian theorist would require of us. It also follows that essentially people must be very different from how any Hobbesian or utilitarian theory describes them.

Before I proceed to examine what sorts of concepts are necessary to explain the genesis and development of law, I must comment on one remaining theory which attempts to suggest an a priori sociology, albeit in terms which do not at once exhibit its apriority. This is Hart's theory.

Hart's thesis about how one moves from a pre-legal to a legal state is very ambiguous because, unlike Locke or Hobbes, Hart does not provide any metaphysics of community or of the nature of man. Sketchy as the theory is, however, it seems to present an alternative to the contractarian thesis because it is presented from a different perspective. However, as I shall argue, this is not the case.

The addition of the rules of recognition, change, adjudication and other second order rules is, says Hart, 'a step forward so important to society as the invention of the wheel ... the step from a pre-legal into a legal world.'[54] Hart does not make an inquiry into history or sociology, nor does he suggest that any such inquiry should be carried out. Hence it is difficult to understand at what stage it suddenly (or slowly) became necessary to add second order rules to the primary rules.

However the important point to note is that even if we grant Hart the a priori sociology—that it became necessary to add second order rules to society's first order rules at some stage of its growth—it would still not prove the point that Hart intends to prove. As we saw in Part II, the property of having primary rules and secondary rules is a property of normative systems in general and not of law specifically. Hence even if what Hart says is historically true, all that it would prove is that a normative system came into existence, not that a legal system did. For, as we have noted, not just any addition of second order rules to the first order rules can constitute the growth of a legal system.

In any case Hart's a priori sociology, although presented without contractarian fabrications, seems to me to be empirically false. It is dubious if human beings have ever lived in a society in which there were only primary rules. Given any organization, whether modern or primitive, that has primary rules defining social practices and institutions, one will soon find I think that the same organization also has secondary rules. The primary rules of all sorts of religious behaviour, for example, were accepted as valid due to the secondary rules by which priests, the witch doctor, the church, etc. were recognized as legitimate legislating authorities. Similarly the primary rules of the *Dharmsastras* were accepted by commoners and kings alike due to secondary rules which recognized the special place of the *sastris* as the legitimate interpreters of the *sastras* within the social system. Even in simpler and smaller social organizations where the validity of primary rules has been based on the authority of a single person, the authority has been recognized by the acceptance of some secondary rules, such as the fact that the person spoke on behalf of God, that whoever proclaims God's words must be obeyed.

As far as history can tell us, all human societies have existed with a hierarchy of rules. This is something which uniquely distinguishes human societies from societies of other gregarious creatures. Perhaps the only creatures that we can point to which live purely by primary rules are ants and bees, though even here we are discovering that there are rules of recognition regarding which queen bee has final authority.

What has changed in the development of societies is not the sudden or gradual *addition* of secondary rules to primary rules, but the very *nature* of primary and secondary rules together. The manner in which secondary rules of recognition, change, etc. has been developing is, of course, also a matter of historical and sociological interest. However, as concerns our interest here, a mere historical or sociological study of the change of primary and secondary rules will not do because, as we have seen (even in the examples above), co-lateral changes in the primary and secondary rules are true of all normative systems. Hence such a study can tell us only about the notion of normative systems, it will not provide any grounds for arguing why the legal system must be one type of normative system and not another. Theories which portray sudden, arbitrary or miraculous moves from a pre-legal to a legal state thus assume arbitrary and even groundless history and sociology.

I shall proceed now to outline the conceptual basis on which the creation and the continuity of legal systems can be appropriately described, a conceptual basis which does not require any fantastic or a priori sociology.

VI. iii Co-operation

In philosophy, as elsewhere, the simpler theory is perhaps the one closest to the truth. The simpler theory which explains how and why civil society came into being would, I think be one that bases itself on the notion of co-operation rather than on contract or punishment. There are several reasons for this.

The concept of co-operation is a very fundamental social notion. The answer to the question 'what does it mean to co-operate?' can perhaps be learnt only by actually engaging in a co-operative activity with other people. The notion of co-operation seems to me to be an epistemologically primary notion, one which explains other notions which involve human actions that are done together, and is itself not explained by them. Co-operative activity is different in some fundamental ways from mere participation and interaction with others.[55] Instead of trying to argue this here, I shall attempt to illustrate its truth through the next point.

Unlike the notion of contract, punishment, etc. the notion of co-operation is conceptually and empirically prior to that of law. That is, co-operation is not explained in legal terms, nor does it presuppose law for its legitimacy. In fact law is to be explained as a co-operative social enterprise. Co-operative activities are carried out by all human beings to fulfil their duties of creating and maintaining a legal system so that a Community of Ends may be actualized. Only such an explanation would constitute a genuine explanation for the existence of the legal system because it does not utilize a notion to explain law, which is itself legal. That is, it does not assume a notion in the explanan which itself belongs to the explanandum. Since the notion of co-operation is conceptually prior to that of law, we can carry on what may be called true co-operative activities with others without having to be explicitly aware of what is the law, but we cannot carry on what may be called true contracting, punishing, or any other legal activity for that matter, without having to explicitly co-operate with others. The internal working of the legal system itself demands that those involved in the legal profession must co-operate with each other so that it becomes possible to carry on the day to day business of the court.

Since co-operative activity is presupposed by law it cannot ask, command, or even request people to co-operate. It must presuppose that in fact by and large people will continue to co-operate with each other to carry on the various economic, political, educational, religious, recreational and other social activities. If people fail to co-operate, law cannot force them to do so, for then it would be trying to bring into existence something which it must already presuppose.

The notion of co-operation does not require one to posit or to hypothesize some imaginary a priori sociological state of affairs such as the state of nature or the 'veil of ignorance'. It tells us that men have gradually co-operated to build better and better legal systems. There is thus a continuity in building a better and better civil society.

Since co-operation is involved in all social activities, including the legal one, this concept explains that legal systems have worked in the same manner as co-operative activities generally do, i.e. more co-operation brings about better legal systems and less co-operation poorer systems. The difference is only one of degree, never of kind. Since co-operation and reasoning are involved at least minimally in every social activity, there is no point at which 'pre-legal' states of affairs can exist. One can only say: at one point the legal activity is minimal and at another more extensive. Such an understanding does not lead us to the false social theory that we have built a civil society *so that* we may have a legal system (as though co-operation in a civil society were a product of the legal system). Instead this understanding leads us to the truth that we have bettered our legal systems *so that* we may have a better civil society.

Lastly, the notion of co-operation preserves the moral uniqueness of law. Law, being a moral enterprise, can be based only on a practice which is itself moral. Co-operation is always a moral activity. For co-operative activity to actually take place it is necessary that the agents follow the basic moral principles, such as being honest with each other, telling the truth, trusting the other's integrity, etc.

What we have discoverd so far, then, is that the idea of law is the idea of a co-operative social activity which is possible on the basis of some basic moral propositions. Co-operation is always non-coercive, hence law which is co-operative activity governed by external morality must also be non-coercive.

Now the term which best expresses the idea of such a system is the Sanskrit term *dharma*. The idea of law is the idea of *dharma*. *Dharma* means the external non-coercive moral order which holds a community together and leads towards a moral ideal. Etymologically the word is derived from *dhri*, which means to hold together in a steadfast manner.

It will be of interest to note here that the word 'justice' derives its linguistic roots from the Sanskrit root term *yu* or *yuj* which means 'to join'. The words 'justice' and 'join' thus have the same roots. *Yuj* becomes *ius* in later Latin and changes through *jus* to *joust* in old French, which retains the meaning 'to join.'[56] *Yukti* in Sanskrit means a principle which is instrumental in joining a means to an end, and *yojna* is a plan to that end. Yoga in its basic sense means that which joins man to the transcendent being. Justice, as opposed to yoga, in its basic sense, then means 'that which joins man to man'.

My statement that the idea of law is the idea of *dharma* is not intended to imply in any way that what I have done in this work is present something in English which is already known in Sanskrit. By equating the two I wish to make clear that if the idea of law has received any clarification and explication in this work, then so has the idea of *dharma*. The latter notion stands in need of just as much clarification as the former.

In the judeao-Christian-Islamic tradition the idea of law has been confused mainly with the idea of the political system. In the Indian tradition *dharma* has been understood as an independent and supreme moral notion, but it has been confused with various elements which actually belong to a religious system. Since I have approached the issues in this work from the perspective of law, I have concentrated on defining it by separating it from ideas which belong to the political system. When the same task is attempted from the perspective of *dharma*, the idea would have to be purified of its association with various ritualistic and customary practices. But in grounding the idea of *dharma* in pure practical reason the most fundamental step towards distinguishing the idea from merely ritualistic, conventional and arbitrary factual beliefs or religious practices has already been taken, and thus an attempt has been made to explicate the essential features of the notion.

If co-operation has brought about the legal system and civil society, then it clearly follows that men have always been acting co-operatively to a greater or lesser degree. Moreover since co-operation requires acting on moral principles it also follows that men are basically not evil, they are moral agents and well intentioned beings for the most part. They do not always act for selfish ends or principles of self-interest. Lastly since law is non-coercive it also follows that human beings act rationally without any compulsion or fear. The notion of a human being that law thus requires is completely different from what any utilitarian legal theory assumes or asserts.

Having analysed the requirements of law from the perspective of the community, I turn now to an analysis of the notion of a legal entity, which includes within itself the essential characterization of humanity which is necessarily involved in the legal enterprise. Such an analysis approaches the requirements of law from the perspective of the individual.

VII THE INDIVIDUALISTIC REQUIREMENTS OF LEGAL ONTOLOGY

By individualistic requirements of legal ontology I mean those necessary metaphysical conditions on the grounds of which certain types of individual entities can be said to be actually populating the legal system. This issue can be approached by raising the question: what sorts of entities qualify to be members of the legal system? Is the membership arbitrary or are there some specific principles which govern legal membership?

The answer to this question would in fact require a discussion at two levels: first, that which spells out the criterion on the basis of which an entity qualifies to be a legal entity; and second, that which spells out the essential nature of such entities. The two issues are indeed related since the criterion cannot be independent of the nature of the entities. However for the sake of clarity it will be best to discuss the two issues separately. In what follows I shall discuss the question of the criterion first and subsequently examine the nature of the entities in which the criterion can be grounded.

VII. i *The Determination of Legal Ontology*

The types of entities that can belong to legal system are specified by basic legal principles. Since such principles are not arbitrary definitions, not any arbitrary entity can be made to belong to the legal system. The principles which regulate what may and what may not belong to a legal system, determine the ontology of law. In what follows I shall define such basic legal propositions and argue that these rules of inclusion and exclusion are necessary for every legal system.

The basic unit around which a legal system is built has traditionally been taken to be a person. Attempts are then made to distinguish a juristic person from a physical or a natural person. The traditional approach is to divide private law into three parts: the laws of person, the laws of obligation and the laws of property. The question of legal ontology is discussed mainly under the first division, in terms of 'status', 'natural personality' and 'corporate personality'. However the problem of defining the criterion which regulates legal ontology is pervasive. It turns up in discussions of public law whenever the ontological status of the state comes under scrutiny. A satisfactory theory ought to provide a unique definition which will encompass the ontology of both private law and public law. That is, an appropriate criterion of legal ontology must apply to law as a whole and not just to some parts of law, as most current criteria seem to do.

The basic problem of legal ontology surfaces primarily in practical difficulties. First due to the fact that not all entities seem to possess a full legal capacity, for example children and the insane; and second, sometimes one does not wish to grant a legal personality to beings who ought to possess it. One is then required to justify one's decisions. We find thus that in some earlier legal systems slaves were regarded as mere chattels and aliens were not allowed to bring a suit to court. Women were also often excluded from the legal system. The question gets further confused when one finds that for practical purposes a legal personality has to be granted to entities other than individual human beings, such as groups, funds, trusts, companies, etc. The lack of clarity about the criterion which determines legal ontology has sometimes led to granting legal personality to idols[57] and animals.[58]

Typical responses to the question of legal ontology have taken two basic approaches. In the first approach physical, natural or rational human beings are distinguished from associations, companies, trusts, etc. To provide a unified theory of juristic persons either the ontic reality of the first or that of the second type of entity is then denied.We thus have R. Ihering affirming that only physical human beings are real and defining corporations, companies, etc., as legal formulae having only a technical worth.[59] On the other hand Kelsen denies that the notion of a physical or natural human being has a legal reality. For him corporations are legally real exactly in the same way that natural persons are, the notion of a juristic person is all that is required. However he does not tell us why this is so.[60] A third and a middle-of-the-road response is to grant some sort of ontic reality to physical persons as well as to corporations, companies, etc. We find Gierke speaking of a group as having a real will, a real mind and a real power of action. He even divides its functions in terms of the functions of the parts of the human body.[61]

However, none of these legal theorists has attempted to show why the option they prefer is morally justified or superior. If the criterion of choice is only that of technical ease and facility, then in the final analysis the choice becomes matter of arbitrary fiat or decree. For what may seem technically easy to one may not be found to be so by another; moreover techniques are bound to change frequently.

The second typical approach to the problem of legal ontology has been the shifting of the question from one of the law of persons to one of the law of obligations. Juristic persons are then defined as those capable of possessing legal rights and legal duties. W.N. Hohfeld, Kelsen and Hart, among others, have advocated this approach.

Now such a definition has traditionally been called a verbal definition, not a real one, and moreover it is circular. By saying that legal persons are those who possess rights and duties and at the same time defining the possessor of rights and duties as legal persons, one has not answered the real question of legal ontology at all. What we want to know is who shall have rights and duties? By replying 'legal persons', only a verbal answer has been given. Or if the question 'who shall be a legal person' is answered by 'those who possess legal rights and duties', then the issue is only evaded. This is precisely what Hart and other positivists seem to do.

Hart's analysis seems to confuse the issue further by suggesting, *a la* Wittgenstein, that to understand the concept of a legal person one must refer to different legal systems and see what rules enable one to make true or untrue statements about legal entities within that system.[62] Such an experiment will no doubt make a person knowledgeable about what different types of entities are accepted as legal entities in different legal systems, but will it tell him *why* there are these differences? On what grounds will he appraise these differences? If such a person wishes to argue that 'slaves' ought not to be populating a particular legal system, he evidently cannot do so by merely pointing to other legal systems which do not have slaves. For then it would be like saying that people in culture A should not be wearing hats because people in culture B do not wear them. Or that citizens of nation X should wear neckties because citizens of nation Y do so. Clearly to argue that a legal system should not allow for slaves, such a person would require arguments which are independently right, whether or not any legal system practises them. We do not criticize the Athenian state which allowed for slaves on the grounds that ours now do not, but certainly on the grounds that slavery is morally wrong at any time. The Athenians did not have enough moral knowledge. The question of legal ontology is not a factual matter which can be settled by mere observation. To make the issues clear the question should be exactly formulated as: who shall possess rights and duties and be a legal person?

Following Hans Vaihinger it has perhaps become common practice amongst lawyers and jurists to refer to some legal entities as 'fictions'.[63] Despite its modern complex technical use in legal discourse, this term seems to have retained its original confusion. The confusion stems from the fact that, like the term illusion, 'fiction' has both an epistemological and a moral implication. An overemphasis on the epistemological implications seems to lead away from seeing the direct relationship that the issues have to morality. Thus one even finds Fuller discussing the problem of legal 'fiction' as though it were only a matter of epistemological concern.[64] Fuller says that legal 'fictions' are theoretical constructs of law and that they function almost in the same way that the theoretical constructs of mathematics, physics and other sciences do. Here he clearly seems to have been misled by the prima facie procedural similarities that seem to exist when one only considers the fact that the theoretical terms of law are defined within the operations of law, just as the theoretical terms of the sciences and mathematics are defined in their operations. The real difference between legal science and other sorts of sciences cannot be grasped by merely observing the procedures, for the differences are substantive.

As discussed in Part III, theoretical terms of law define and refer to totally different kinds of entities which can neither be classified as natural kinds nor as nominal kinds. They define and refer to normative kinds. The theoretical terms of mathematics lie at one end of the moral spectrum, those of law lie at the other extreme. That is, mathematical terms may be taken to be morally neutral, or at least related to morality in a very indirect way, whereas legal terms are immediately and fully morally relevant. How one defines or accepts one's mathematical ontology may only very indirectly be the grounds for some injustice in the world, but how one defines or accepts one's legal ontology affects the existence of just or unjust conditions immediately. If numbers and triangles are said not to exist in all or some possible worlds there is perhaps not much to worry, but if some people or groups are said not to exist in all or some worlds there is certainly a great deal to worry. For to deny them existence is to deny them their duties and rights and hence the possibility of achieving their moral ends.

What is a permissible legal ontology, then, is evidently a moral question; and it is a question of a sort which cannot be answered by talking in terms of legal rights and duties because it is already presupposed by the law of obligations. Nor can any enlightenment be gained by studying and applying mathematics or physics to legal ontology, for the normative entities are qualitatively different from natural or nominal entities.

Where then must one look for the solution? In so far as law is a systematic enterprise to bring about certain conditions in a society, the answer to the question 'who may be its members' must clearly depend upon what is taken to be the systematic aim of law. In other words the criterion concerning who shall possess duties and rights and thus be a legal entity is dependent upon what we take to be the ends of law.

The necessary relationship between the criterion for class membership and the ends of a system is not something which is peculiar to law, as argued in Part II, it is true of all normative systems. If for example we want to create a team which will play football well, the criterion for membership is good health, ability to control the ball, etc. Similarly if we want to create an administrative system for the country, we select men with certain educational and technical qualifications, or if we wish to prepare a system which will defend the country against external invasions the criterion for class membership of such a system is such that alert, healthy and obedient men are chosen. In order to decide the criterion for class membership of any system which is meant to achieve something, we must naturally take into account the goals or purposes of creating that system.

As we have seen, the transcendental ideal of law is to bring about the best normatively possible world—one that will be most harmonious, will contain the most compossible set of normative systems, and will allow for optimal variety in deeds and thoughts. The metaphysical conditions which make such a possible world actual are those of the Community of Ends, which involve the conditions of freedom, equality and independence. As such the answer to the question 'who shall possess rights and duties and be a legal entity' is evident: *Every agent within the jurisdiction about whom there is no evidence that he, she or it will be, or is, an obstacle to the achievement of freedom, equality, independence and the best normatively possible world, must be explicitly recognized by law as being a legal entity.*

The 'must' in the case above arises from the fact that every moral agent has a duty towards creating the best possible world. Those involved in the legal profession also have the same duty. Since maintaining a legal system is necessary for fulfilling such a duty, and since having members is a necessary material condition for maintaining a legal system, it is a necessary duty of all involved in the legal profession to see to it that the legal ontology is appropriately maintained on the basis of this criterion.

The principle is formulated negatively because although it can be known a priori what ideals a legal entity must attempt to achieve, it cannot be so known regarding who will actually attempt it. Hence, here as elsewhere, law must assume everyone to be a moral agent doing good, unless there is evidence to the contrary. This means that the starting point for every autonomous legal agent is a full legal existence, having all the duties and rights that are his due. The extent of his rights and duties and hence his legal existence is directly related to his capacity to act as an autonomous agent.

From the point of view of evidence this formulation thus brings five different types of entities under consideration. These are, first, entities about whom we have clear evidence that they will not enhance the ends of law; such entities can never become legal entities. Functionally corporate bodies such as the Mafia and the Ku Klux Klan fall into this category. Such entities do not exist in the legal realm, they are, as the word rightly goes, outlaws.

Second, entities (at the other end of the spectrum) about whom we have clear evidence that they will enhance the ends of law; the law facilitates the existence of such entities. For example groups who work for the welfare of the handicapped fall into this category.

Third, entities about whom we have neither any positive evidence that they will enhance the ends of law nor any negative evidence that they have attempted to do the contrary; the majority of individuals and groups fall into this category. All such entities must necessarily be recognized as members of the legal system on the assumption that their ends are consistent with the ends of law.

Fourth, entities about whom we have some but not conclusive evidence that they will get in the way of the ends of law; such entities are recognized but their existence is restricted by limiting their activities. Groups or individuals who deal in alcohol or weapons, for example, fall into this category.

Fifth, entities about whom we have some but not conclusive evidence that they will *not* get in the way of the ends of law; such entities are not legal entities. The existence of such entities is restricted by limiting their activities in many ways. For example groups or individuals who deal in prostitution fall into this category, since although we know that the activities of such groups or individuals leads to numerous evils we do not fully understand why their activities affect the achievement of the ends of law. This makes this category different from that of the Mafia which, we clearly know, acts against legal ends.

The principle determining the ontology of law is synthetic in the sense that it informs one about how the legal system is to be populated, but it is also a priori because it bases itself on human reason rather than the experience of any particular legal system. It is a normatively synthetic a priori proposition.

This principle overcomes a major confusion concerning the notion of a juristic person. As noted, the confusion about the notion of a juristic person arises because people think that this notion has to do with some empirical factors. On discovering that human beings have physical bodies and that corporations, trusts, etc. do not possess one, elaborate schemes are made to either reduce corporations, etc. to an assembly of rational persons, or to reduce natural persons to fictions. The formula tells us that the characterization of an entity as a juristic person does not depend on material factors such as whether the agency consists of once or many bodies, or whether they are made up of matter, anti-matter, organic or inorganic substance, etc. It depends entirely upon a priori moral considerations which arise out of the internal nature of law itself.

In so far as any agency of some legal jurisdiction can act in accordance with the systematic aims of law, he must be recognized as a legal entity of that jurisdiction so that eventually every agent is a full member of at least one legal jurisdiction. To the degree and extent to which he does not so act, his existence as a legal entity must be restricted. Rights and duties can also be restricted so as to create partial membership, but this applies only to persons from *other* jurisdictions—such as is the case with visitors and immigrants or foreign corporations. The notion of a legal entity is intelligible in the normatively possible world since it is an idea of that world; as such no factual attributes belonging to the factually possible world enter into the criterion of legal ontology. The legal enterprise itself, it must be remembered, belongs to the normatively possible world created by human beings.

As a corollary, this formula also answers the traditional question: 'what is common to physical persons, corporations, trusts, etc.' What is common to all of them, *qua* (and when they are) legal entities, is that they share the same teleological ends, i.e. none of them are obstacles to freedom, equality and independence, and all of them, in so far as they are acting legally, attempt directly or indirectly to enhance the ideals of law.

Since the principle is normatively synthetic a priori it regulates the constitution of the legal system, but it leaves open the empirical considerations about when exactly a biological existence starts or ends. It also leaves open the possibility of creating an infinite number of novel and different legal entities, because although the legal ideals can be known a priori it cannot be so known in what different ways various legal entities will actualize these ideals.

The main virtue of the basic principle, however, lies in the fact that it provides the basis for a unified theory of both private and public law. From the point of view of public law, an association of men who form a political party is, first of all, an association in the same sense as a corporation or a company. The main difference of course lies in the ends for which these different types of associations are formed. But in so far as the political party (including the one that gets the majority of votes and forms the government) is an association of men, the principle that law applies to every other association applies to this association too. Law in this fundamental way is impartial. All associations of men, for whatever purpose, are to be judged by the same rule. What this means in practical terms is that only if the systematic aims of the association of men who form the government are consistent with those of law can they be a legal entity; otherwise they are illegal. If the association of men who form the government is to be referred to as the state, then the principle of legal ontology tells us that only a state which actualizes the ideals of freedom, independence, equality and of the normatively best possible world will exist in reality as a legal state, otherwise it would only be a system by decree, force or fiat.

This principle does not exalt the association of men that becomes the legislator into a peculiar type of entity whose activities are not accountable in law. In fact since legislators are those people to whom society has entrusted the special task of regulating the path towards the best possible world, the legality of their actions becomes a matter of utmost importance.

Negatively, the principle lays down a strict restriction for legislators and those involved in the codification of law. It requires that in deciding whether or not an entity can become a legal entity only those aspects of its existence be taken into consideration which are relevant to the achievement of the ends of law. Factors over which an individual or a group has no control, or which it cannot determine for itself, cannot evidently be the aspects which are relevant to the achievement of ideals such as freedom, equality and independence. Such factors as the colour of one's skin, one's caste, the place of one's birth and the religious creed one is born in are obvious factors which an individual or a group cannot determine for itself and which are thus not conducive to the achievement of the ends of law. In other words biological, sociological, geographical and other factual attributes cannot be the basis for defining legal entities. Only legal attributes can characterize a legal entity.

VII. ii *The Concept of a Legal Person*

The actualization of the idea of law requires that human beings co-operate to sustain and develop the legal system. Co-operation involves working on moral principles since it is a moral activity. This itself suggests the first attribute of a legal person, namely that legal persons are co-operative moral agents. The moral principles which the agents act upon are those of the Kingdom of Ends, and the ideals that they are working for are those which belong to the idea of the best normatively possible world. In brief, then, legal persons are co-operative moral agents working in accordance with the principles of the Kingdom of Ends for the ideals of the best normatively possible world.

This is a functional definition of a legal person. It characterizes him in terms of the purpose of his actions, but as yet it does not give us a definition which tells us what is substantively involved in the concept of a legal person.

In the *Groundwork* Kant tells us that essentially or substantively man is unique because he has dignity. Dignity is what distinguishes man from all other creatures. A thing has a price if any substitute or equivalent can be found for it. It has dignity or worthiness if no substitute can be found for it.[66]

But why does man have dignity? If a human being is just one more material thing amongst other material things in the world, then evidently if human beings have dignity so do lamp posts and stones. If the latter do not have dignity then there are no grounds for believing that human beings have it either. On the other hand if a human being is just another living thing amongst other living things and if human beings have dignity on this account, then cockroaches and bacteria do too. If the latter do not have dignity then there is no special reason why human beings must have it.

The worth of a rational being, according to Kant, consists is his autonomy from the course of mere phenomenal nature. His dignity consists in being a self-legislating member in a Kingdom of Ends. In Kant's words, 'morality is the only condition under which a rational being can be an end in himself; for only through this is it possible to be a law-making member in a Kingdom of Ends. Therefore morality, and humanity, so far as it is capable of morality, is the only thing which has dignity.'[67]

It has been noted by H.J. Paton that Kant's definition of morality in terms of freedom, and freedom in terms of acting morally, leads to a problem of circularity. Consequently we do not come to know more through the concept of morality than what we already know through the concept of autonomy or freedom.[68] J.G. Murphy attempts to overcome Paton's charge that Kant's arguments are circular by distinguishing between free *Wille* and free *Willkür*, i.e. between the freedom of choice to act on the basis of a moral law and the spontaneous free activity of a person, respectively. Murphy thinks that Kant meant man's dignity is grounded in possession of a free *Willkür*, which therefore does not make Kant's argument circular.[69]

Such an interpretation seems to me to be questionable, for Kant himself not only distinguishes between *Wille* and *Willkür* but also clearly states that it is the free will, only in the former sense, that is involved in law and morality.[70] However, whether one interprets free will as autonómy or spontaneity, in so far as the notion of dignity is concerned the circularity remains. If dignity is to be explained in terms of having a free will (in either sense) or being moral, then in learning that man has dignity we have not learnt anything more than what was already conveyed through the concept of morality or freedom.

Kant's characterization of human dignity as depending on free will and on autonomous actions makes it a matter of analytic truth, a definition which merely repeats that man is a moral agent. Analytic a priori truths, even by Kant's own account, do not inform us of anything more than what we already know. Hence if human dignity is to be a synthetic notion, something which tells us more than the fact that man has free will, it cannot be a matter of mere verbal definition.

A synthetic notion which tells us more than the fact that man has free will is indeed worked out and presented by Kant. This is contained in his discussion of the immortality of the soul. However, as I shall presently argue, the grounds for human dignity cannot be derived even from the postulate of the immortality of the soul without making some very radical changes in the thesis.

In the *Critique of Practical Reason* Kant tells us:

> The achievement of the highest good in the world is the necessary object of a will determinable by the moral law. In such a will, however, the complete fitness of intentions to the moral law is the supreme condition of the highest good. This fitness, therefore, must be just as possible as its object, because it is contained in the command that requires us to promote the latter. But complete fitness of the will to the moral law is holiness, which is a perfection of which no rational being in the world of sense is at any time capable. But since it is required as practically necessary, it can be found only in an endless progress to that complete fitness; on principles of pure practical reason, it is necessary to assume such a practical progress as the real object of our will.
>
> This infinite progress is possible, however, only under the presupposition of an infinitely enduring existence and personality of the same rational being; this is called the immortality of the soul.[71]

There are two additional synthetic notions concerning human free will that Kant presents here which he does not seem to have maintained consistently eleswhere. First that pure practical reason must necessarily assume that a free will can become a holy will if it progresses far enough, and second that the existence of such a free will must be assumed to be enduring infinitely to allow for the actualization of its moral end. The idea of a perfectly holy and immortal will, as Kant tells us (in the very next section after the one quoted above), is indeed the idea of god.[72]

Now the idea that the ordinary human will can eventually become a holy will, i.e. a godly-will, certainly generates the notion that man can have dignity, at least eventually, when his will becomes a holy will. But what happens in the meantime? On what basis can human will be said to have dignity while it is still an ordinary rational will? Clearly law, such as in the Universal Declaration of Human Rights, explicitly asserts that human beings have dignity here and now, whether they be immortal or not. The Universal Declaration of Human Rights states: 'Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...' Also, Article 1 of the same Declaration continues: 'All human beings are born free and equal in dignity and rights....'

Now the thesis that all human beings have *inherent* dignity, and are *equal* in this respect here and now cannot be held without making some very radical changes in Kant's assumptions.

The first change required is that the belief that human will can become holy will, and thus be deserving of complete dignity, must not be a mere postulate of reason but must actually be true. That is, the possibility that human will can be a holy will, and thus morally perfect, must not be taken to be a mere epistemological possibility, a matter of mere thought, but an actual ontological possibility, for law does not just postulate human dignity in reason, it wants to assert that each human being actually has dignity.

In the first *Critique* Kant had called the idea of freedom a postulate of reason. However by the time of the second *Critique* he tells us that the idea of freedom is real, it is not a matter of mere thinking. We come to know of the reality of freedom through our moral actions in the noumenal realm. I am suggesting here that if Kant had continued to make his moral theory consistent he would also have had to accept the possibility of a rational will becoming a holy will as ontologically true and not just an epistemological truth. The idea of law demands this.

The second radical revision which is required to make the notion of legal dignity intelligible follows from the first revision. If the idea of a moral progress from a rational will to a perfectly holy will is not only epistemologically but also ontologically true then it follows that the existence of the rational will is ontologically continuous with the existence of the perfectly holy will. If an ontological discontinuity is postulated at any stage of the moral progress, then a rational will can never actually be a holy will, the progress will be arbitrarily cut off at some stage. The continuity in moral progress must not only be in knowledge but also in *being* a person.

The thesis that there is not only an epistemological continuity between a rational will and a fully holy or moral will entails the following conclusion. We can legitimately make not only a epistemological but also an ontological claim about man. Epistemologically, from the point of view of a rational will, a perfectly holy or moral will is a perfectly rational will, and from the point of view of the perfectly holy or moral will a rational will is nothing but a very imperfect holy or moral will. Similarly, ontologically, from the point of view of an autonomous or moral person, a perfectly autonomous or moral person is a holy or divine person; from the point of view of the holy or divine person an ordinary autonomous and moral person is a very imperfect holy or divine person. Since there is a continuity in moral progress, how we characterize a rational will or a moral person depends upon which end of the path we choose to make our frame of reference.

If with Kant one wishes to hold that the idea of a perfectly holy will is the idea of god, then the second revision above can be summarized as the thesis that there is an ontological continuity between man and god. The point in the paragraph above tells us that just as god can be characterized as an infinitely rational and moral person, a person can be characterized as a very finitely rational and moral god. That is, a person is god himself in his finitude. His moral goodness is due to his godliness and his evil is due to his finitude in reason and action. The difference between an ordinary rational will and a perfectly rational will is one of degree, not of kind. Being godly, human beings are capable not only of self-legislation, i.e. moral actions, but also unconditional love, caring, kindness, compassion, charity, benevolence, etc. But being finite in reason and controlled by passion, at times they are capable of evil. The essential nature of a person is that of a finite divine being who is always capable of becoming a holy will. The finitude is only temporary, if it were a permanent feature of human nature no moral progress could ever be made. The idea of moral progress would be unintelligible. Human beings are thus inherently, essentially and unconditionally good; evil is not essential to their nature, it is something that their circumstances, education, society, etc. makes them.[73]

Whether or not the idea of a continuous *moral* progress, from being a rational will to a holy will, requires the immortality of the person, is a question for ethics. In so far as law is concerned what it must accept as real if it is to work at all is that a person is a finite holy will who can become a holy will again through moral progress, and that it must do so at least, and certainly, in this very life, whether or not it be immortal. Similarly, whether or not any perfectly rational, divine will actually exists is a question for rational theology. In so far as law is concerned all that it has to accept as real is all that it finds, i.e. embodied (very) finite holy wills.

Each human being has unconditional and inherent dignity because in this very life human beings are finite, divine, holy wills. This is the only ultimate ground on which the idea of human dignity can be sustained in law. Being divine, evil is accidental to human nature, an abnormality which must be eradicated and remedied. If law took evil to be a natural aspect of human behaviour, not only would it lose the fundamental basis for asserting that human beings have inherent dignity but it would also lose the central motivation for attempting to remedy or reform evil persons or situations.

Hence as it turns out the only grounds on which human dignity can be sustained in law is that which recognizes the idea of rational or moral progress to be inherent in the concept of a legal person. Any reductionist theory makes the notion of human dignity untenable, and thus makes the legal enterprise a meaningless and arbitrary affair.

The idea of the self—which is a co-operative agent working on moral principles and which is striving for moral perfection and is essentially divine—is conceived more appropriately as an *ataman* than as a soul. The being of the *ataman* is ontologically continuous with the being of the absolutely divine will, and it is the idea of the divinity within finitude.[74] As such it has unconditional and total dignity, because it is always capable of realizing its infinitude. The idea of the soul has been characterized as ontologically distinct from god. As such it does not have unconditional and total dignity because in the final analysis it can never become as morally perfect as god, i.e. it can not itself become god and thus gain a worthiness that is equal to what a divine will deserves. Only god and not man would have dignity in such a scheme.

The idea of the soul has sometimes also been characterized as infested with 'original sin', of the soul being innately evil or sinful.

Such a thesis is also damaging to the legal idea that all men have *inherent* and *equal* dignity. Legally, goodness must be conceived as innate and evil as an abnormality. The ground for dignity is divinity.

The idea of the self as an *ataman* is compatible with the legal belief that human beings have dignity, here and now, in this very world. The question of immortality in the strict sence does not arise for the *ataman* because it is conceived as not being in time. One must recall that Kant's transcendental ego too is not in time, and it is this ego which, as noumenal self, participates in the noumenal realm, which is the legal realm in Kant's final *Metaphysik der Sitten.*[75] Kant does not seem to have realized the difficulties in his various accounts of the self as the transcendental ego, the empirical ego, together with the unexplained thesis about the self as a soul.[76] A consistent Kantian theory of the self would I think have to clarify his notion of the transcendental self, which would than be closer to the notion of the *ataman*.

The concept of a legal person then is the concept of an *ataman*. Kant's dictum, 'treat everyone as an end in himself', substantively means '*treat everyone as an ataman*.' This last proposition is the synthetic a priori proposition of pure practical reason which is the substantive individualistic requirement of legal ontology.

The concept of a legal person as a rational, moral agent who is the divine will itself in its finitude and who manifests a teleology in which the self wants to transcend or liberate itself from all its finitude, generates complex questions about the sort of teleology that is involved in such a moral progress and the *course* of such a progress. I shall discuss this issue in detail in the next section. Here it is important to note that if the notion of such a self which manifests a *telos* is inherent in the idea of law, then evidently the main function of law becomes to provide the conditions for the fulfilment of such a *telos* for the self.

To treat human beings as *atamans*, i.e. as legal individuals, is to treat them with full dignity and as equals, it is also to recognize all their rights, duties and freedoms which are instrumental in the realization of their ends, namely becoming a perfectly rational and divine will. Moreover, to treat people as *atamans* is also to help them to proceed on a legally defined course of actions, if and when they deviate from fulfilling their expected teleological end. Of course what constitutes deviation and help must be decided in and through procedures in which all are still treated as *atamans*.

There are various normative systems which do not or have not treated their subjects in the way mentioned, but which have nonetheless claimed to be legal systems. Since the concept of a legal person is the concept of an *ataman*, any system which does not treat (or continue to treat) its subjects as *atamans* is not a legal system. Such systems, which do not operate with the concept of a legal person, are systems by fiat, force or command, they can never be legal systems.

I realize that the concept of the self is a complex philosophical issue, one that requires a more detailed analysis than I have presented here. I have discussed it only from the point of view of law and not of general philosophy. However I think it will not be out of place to present some further general considerations which may help in clarifying the philosophical foundations of the concept as it relates to law. Evidently in a work of this nature the justification of such remarks will have to be limited.

Social philosophy is not concerned with such metaphysical questions as whether the self is a body or a mind, or whether there is a soul or *ataman* separate from the body. It is only concerned with it as an agent that exists in the social realm, irrespective of its metaphysical composition. As an agent the self not only does actions which affects it and others, but also enjoys or suffers the consequences of such actions. Hence when I refer to the self as an *ataman* in this discussion it pertains only to its existence as an agent.

From the point of view of social philosophy, traditionally two extreme conceptions have been employed concerning the nature of the self. One has its roots in classical Greek philosophy, where the self is understood as having a *telos*, where individuals indentify themselves only in relation to others and are constituted by such relations in a community. The other has its roots in the enlightenment, especially in Kant; this presents a major departure in conceptualizing the self as an autonomous agent who, as a rational being, is given independently of his social relations. The traditional Indian view is more in accord with the Greek view than that of Kant. In modern times these antipodal views express themselves in the tension between individualism and communism. Max Weber and George Grant, for example, have sought the roots of individualism in the Protestant ethic. Protestant thought, however, can trace its most profound foundations in Kant. Communism on the other hand can trace its roots to Aristotle, for whom the good of the individual is the same as the good of the community. In rejecting the Kantian view and bringing back the individual into its real historical context Hegel, in effect, reverted to the Aristotelian view, albeit in a much modified form. Although Marxism denies Hegel's ideological basis which explains the individual's status, it accepts the fact of its historicity, and thus the fact that an individual is constituted of its social relations. In so far as Aristotle's views were reaffirmed in Europe through Thomas Aquinas and Hegel, communism has greater affinities to Catholicism than it may realize.

The Kantian self, on a common reading, is an autonomous and rationally willing self which is intelligible irrespective of the ends one may postulate for it. Such a will is of universal scope and has a reach in a Kingdom of Ends. The classical Greek self, however, is on a teleological path marked by a progressive awareness of self-knowledge and knowledge of the world. The traditional Indian self on the other hand is on a teleological path of progress not only in knowledge but also in being. In the Indian view the ontic status of a being (*ataman*) is not given a priori, it depends upon its knowledge and actions. The ontological and the epistemological status of a person is interdependent. A *rishi* or a sage or a *pandit* is not a person who just knows more, but is also a morally better person who, having greater self-realization, can act better. This union of ontic and epistemic status in the concept of the self is something which clearly distinguishes the Indian view from the Greek view.

Now it may seem that in accepting Kant's idea of the Kingdom of Ends I have accepted a view of an autonomous and socially isolated self. But as discussion in this section should show, I do not accept this view. I have tried to show why Kant's view requires some radical revisions. Although my view has similarities to the Aristotelian view it goes beyond into the Indian view in which knowing and being are related. The revisions in Kant's beliefs are required to explain the fact that the Kingdom of Ends is a real possibility. But this possibility can be realized only if the ontic progress of individuals is simultaneous with the development of their rationality, i.e. their epistemic progress. Such a necessity is inevitable in the Indian view.

The idea of an *ataman* as a willing agent having a reach in the Kingdom of Ends does not preclude it from being a progressive agent which develops its rationality through knowledge and whose status can be explained in terms of its historical situation. In fact it emphasizes this very idea. One can progress towards greater rationality and hence towards greater self-realization in this very life, even if one excludes belief in progress through many lives. In a more detailed account of the self I would relate the factors regulating its ontic state with the social history of its situation, although not totally dependent on it. The concept of the *ataman*, in the manner I have presented it here, cuts through the traditional dichotomy between the Aristotelian and the Kantian conceptions and provides an alternative which allows us to see it as an agent whose freedom or autonomy is to be realized in a society and whose ontic and epistemic status is as much dependent upon its historical situation as its own free will to transcend it. As noted, as far as law is concerned it relates only to that aspect of the agent which is seeking autonomy and progress, so as to provide the conditions for the achievement of such ends. Law is not concerned about whether or not the agents are actually motivated or being pursued to attain such ends. This is taken care of by the educational system—including parents, relatives, friends, sages, gurus, advertisements and the media.

Reference to moral ends and the distinctions between the Aristotelian, Kantian and the Indian view necessitates some deeper reflections than I have presented so far. The question about the good or moral ends is not as straightforward as it may look prima facie. It can be misleading because it is not clear whether one is talking about the moral ends which are to be achieved or the conditions which are morally good for the achievement of those ends. In contemporary moral philosophy this confusion seems to be ubiquitous. When philosophers discuss social or individual moral good they are often usually talking about both in a mixed way. But this can only lead to more confusion than clarity. Such a confusion is evident in a leading text such as Alan Donagan's *Theory of Morality*.[77] What Donagan and moral philosophers do not usually make clear is that there are two aspects to any theory of morality concerning both individuals and society: one concerning moral ends and the other concerning the moral conditions to achieve those ends. In traditional Indian philosophies where the distinction has been clearly maintained (although not so clearly understood in contemporary literature) the study of moral ends comes under the study of *purusartha*, and study of the conditions for them comes under *dharmasastra*. A theory of *purusartha* is different from a theory of *dharma*. In Western philosophies the general confusion between the two aspects of moral theory can be traced back all the way to Plato who talks of the Good in a general way. In Western terms a 'theory of *purusartha*' can be translated roughly as 'teleology of moral ends'. I am not suggesting that such teleological inquiries are lacking in Western thought, but only that the distinction between the two aspects of moral philosophy is often unclear, as a consequence of which the moral aspects of teleological inquiries often go unperceived. For example it is evident that Kant does not perceive the moral aspects of his third *Critique*, where he discusses teleology. He mentions perfection and culture as teleological ends in this work. But these are also moral ends. In his major work on morality, *Groundwork*, only happiness as an end finds place for extended discussion. Certainly, one cannot expect him to discuss *moksha* or *nirvana* as moral ends in this work, but ends such as culture, perfection or tolerance are aspects of moral philosophy. These, incidentally, find place in works such as *History from a Cosmopolitan Point of View* which, assumedly, is not concerned with moral philosophy. But then one has to ask: in the *Groundwork* is Kant interested in moral ends or the conditions for the achievement of moral ends?

Leaving aside the puzzles and exegesis of Kantian thought and returning to the central theme, the point to be emphasized is that it is not the task of a theory of *dharma* to tell us what the *purusarthas* are. It can only tell us the moral conditions in which the decided (or hoped for) moral goods can be achieved. In fact law must never dictate the moral ends in this sense. Therefore a question such as 'is that which is good for an individual also good for society' belongs more appropriately to a theory of *purusartha* than to a theory of *dharma*. The analysis of the self that I have presented here is from the point of view of the latter theory. A discussion of Kingdom of Ends in this aspect of the moral theory does not mean that one is discussing a kingdom in which the moral ends have been attained, but only a kingdom in which anyone can attain his moral end when he so desires.

However in an earlier chapter, while discussing the notion of possible worlds and not just law, I did make reference to one teleological moral end of individuals, although I have not discussed it in detail in this work: that of creation. In contending that creation is a necessary teleological moral end for the self I have departed from the traditional Vedantic view, although not totally from that of the Sankhya. To me the teleological end of *moksha* or *nirvana* (liberation) is best explained through the generic concept of creation—be it creation in art, literature, philosophy, dance, social actions or the creation of normative systems or institutions. An individual realizes himself only in his creations. Since all such creative actions or processes are part of the social and historical situation of a person, self-realization or liberation cannot be independent of his historical context. At the social level the creation of the Kingdom of Ends is the creation of the best conditions in which all individuals can realize themselves. In utopia, society has, as it were, completely self-realized itself.

I will conclude this discussion by drawing attention to one last conclusion that follows from conceiving the self in the manner done here. When the ontological continuity between the self and the infinite or divine being is understood, then 'Thy Kingdom Come' becomes 'Our Kingdom Come', since 'thou' and 'us' are different manifestations of the same thing. Thus when Marx saw the unity of human material and the rest of the universe (he called this unifying principle 'matter') he brought down heaven to earth and called it a communist society and populated it with human beings, not gods. Any theory of the self which sees an ontological continuity between it and the rest of the universe, or any scientific theory which presents a unified theory of the universe—in which human beings are only a different sort of manifestation of the common stuff of the universe—must naturally also portray a continuity in the results of infinite and finite labour. The ideal society would be a result of the labour of the stuff of the universe carried out through man. In other words the best society (heaven) cannot have an existence transcendent to human existence. Its real existence can be only one in which human beings have accessibility and real existence, i.e. while they are living. The fact that we do not have such an accessibility at present is because the best society (heaven) does not as yet exist. The creation of *swarga* or utopia, which can only have an existence within this real world for us, is our legal duty. It seems to be this implicit understanding at some deep level within each self that gives life and zeal not only to Marxists and Democrats but all those engaged in liberating their society from colonialism, imperialism, racisim and the yoke of all exploitation.

SECTION III

THE TELEOLOGICAL REQUIREMENTS OF LAW

I THE TELEOLOGICAL REQUIREMENTS OF LAW

Law is a dynamic system. Major and minor changes occur fairly regularly in any legal system. The question that I wish to consider here is: are these various major and minor changes related to each other in some general way, such that a pattern can be discerned in the systematic development of laws? There is a second question that arises related to this first one and which demands separate consideration: if there is a pattern in the development of law, how is it conceptually best characterized?

I shall argue that a general pattern can indeed be discerned; the development of law is regulated by certain teleological requirements. The direction and the change can be better recognized if one considers legal phenomena not only at a micro level of individual changes in the law, but also at the macro level of systematic changes.

The teleological requirements of law define the necessary and sufficient conditions which constitute a legal way of changing or amending the system. That is, they define what constitutes a legal course of action. Actions not done in accordance with these criteria would fail to be legal actions. They could be political actions, crime, vendetta, or other types of actions. When actions are carried out in accordance with teleological requirements there is a continuity in the growth of legal systems. But deviations from the normal course of legal development can lead to a breakdown in this continuity.

II THE DYNAMICITY OF A JURISTIC CYBERNETICAL NORMATIVE SYSTEM

What distinguishes a juristic cybernetical normative system, i.e. a legal system, from on the one hand open dynamic normative systems such as modal music and on the other cybernetical systems such as language, is not only the uniqueness of its foundational norms but also the uniqueness of its norms of amendment. Such norms, which are in accordance with the teleological requirement, are synthetic a priori propositions of pure practical reason, like the other basic propositions of law. However, as we shall see, they play a totally different role.

A legal system belongs to the normatively possible world. The dynamism of such a system cannot be understood independently of the larger context in which the system exists.

Since law is aimed at creating the best possible world, the self-regulation and adaptation on the basis of the laws of amendment cannot be arbitrary. Only those amendments will enhance the actualization of the systematic ends which are congenial to its continued existence and growth.

Since law is given actual form by human reason, the growth or dynamism of law must also be the growth or dynamism of human reason. Moreover since law is a co-operative enterprise the development of law is the development of *co-operative reasoning*. The more reasonable a people are the more legal their behaviour, and vice versa. The development of law thus naturally entails the development of all those factors which will facilitate reasoning between people, such as codification of law to make it easily accessible, gradual simplification of procedures and rules, improvement of the technology to communicate laws, etc. The dynamics of law thus involve a continued development of co-operative reasoning so that the ideal states of the Community of Ends may be actualized, which, as we have noted, consist of elements such as freedom, equality, independence, harmony and compossible diversity. In the development of co-operative reasoning there can be no sudden jump from a state of nature to a legal state. The progress is gradual and the possibility of various errors and deviations from the normal course must be expected.

This account, however, only outlines the uniqueness of the teleology involved in law, it does not as yet tell us about the peculiarity of the amendment procedures involved in such a vectorial progress. I shall proceed now to discuss the specificity of the amendment procedures involved in law and the conceptual scheme within which it may be best conceived.

III GROUNDS FOR THE NORMS OF AMENDMENT

To discuss the specificity of the principles of legal amendments I shall turn to Kant's third critique, the *Critique of Judgement*, for it is here that Kant discusses the problem of teleology in detail. Kant's discussion provides a penetrating analysis which one can fruitfully exploit. Evidently this is not the only method of approaching the issues. My analysis will once again attempt to express itself by assimilating and building upon what seem to me to be the right elements in Kant's view rather than by starting *ab initio*. I shall naturally only refer to those elements in the third *Critique* which relate directly to law.

The aim of Kant's third *Critique* is to show how the two different realms, the factual and the normative, have something in common. The common ground presents itself when one considers the issue of teleology. It will be recalled that hitherto, in the first and the second *Critique*, the factually and the normatively possible worlds were conceptually totally distinct. As Kant tells us in the third *Critique* the first type of world is understood in terms of 'natural concepts' and the second type is intelligible in terms of 'concepts of freedom.'[1] 'Natural concepts' are the ones which apply to nature and are thus related to the concept of causality. 'Concepts of freedom' apply to the noumenal realm and are related to the concept of morality. However, in the third *Critique* Kant finds one concept which applies equally to both the phenomenal, i.e. factual, realm, and the noumenal, i.e. the normative, realm. This is the concept of *purpose*.

The concept of purpose, however, belongs neither to pure reason nor to the understanding, in Kantian terms, but to their use or application in what Kant calls judgement. 'Judgement in general is the faculty of thinking the particular as contained under the universal.'[2] Our capacity for thought has three aspects: understanding, which is the ability to have knowledge of the universal; judgement, which is the capacity for subsuming the particular under the universal; and reason, which is the capacity for determining the particular through the universal (for making deductions from principles). The understanding furnishes a priori laws of nature for the factual world; reason furnishes a priori laws of freedom for the normative world. Judgement however, is not an independent cognitive capacity. It does not provide us with concepts (like understanding) or ideas (like reason). If the concept of purpose belongs to judgement, and judgement is not an independent cognitive faculty but only the application of reason and understanding, then it clearly follows that there must be two distinct types of applications of the concept of purpose: one through understanding for the factual realm, i.e. nature, and the second through reason for the normative realm, i.e. the realm of freedom.

Kant in fact does make the distinction between two types of judgement, the *reflective* and the *determinate*. In the first, as he tells us, 'The understanding legislates *a priori* for nature as an object of sense—for a theoretical knowledge of it in a possible experience'; whereas in the second, 'Reason legislates a priori for freedom and its peculiar causality.'[3]

On the basis of this account that Kant presents in the Introduction of the third *Critique*, one would naturally expect him to explore the two distinct uses of the concept of purpose and tell us not only about how it is involved in understanding nature but also how it is used by reason to determine the 'peculiar' causality of the realm of freedom. One would expect him to explain what is so *peculiar* when the concept of purpose is involved in the normatively possible world. But Kant does not do so.

In the third *Critique* Kant makes use of teleological concepts, such as the concept of purpose, only in so far as the interpretation of nature is concerned. Teleology in nature, he tells us, is merely an epistemological principle, not an objective ontological one. In other words the principle that nature is purposive belongs to the reflective and not the determinate judgement.[4] When we judge that the purpose of the heart is to circulate blood through the body, the concept of purposiveness of nature is introduced to assist our *reflection* of the object under consideration, not to give it conceptual *determination*. It has a heuristic and investigatory value, according to Kant, but it does not require that we believe that this is how things really are.

The physical sciences have some fundamental principles without which, as Kant argued in the first *Critique*, not merely physics but all experience would be impossible. The most important principle from the point of view of natural sciences is that every event has a cause. The main thesis of the teleological section of the *Critique of Judgement* is that the biological sciences have a basic principle of their own, which is sometimes expressed as 'nature does nothing in vain' but which Kant expresses more clearly as: 'An organized natural product is one in which every part is reciprocally both ends and means.'[5] Nature is unintelligible to us unless we assume that everything in it is purposively designed in a mutually helpful way. The teleological principle of the biological sciences is, as noted, a regulative and not a constitutive principle; it is to be used only as a maxim to guide us in our enquiries. This teleological principle is thus to be contrasted with the proposition that every event has a cause, which, according to Kant, is objectively true of phenomena.

Now Kant's aim in the third *Critique* once again seems to be to deny knowledge so as to make room for faith. That is he wishes to show that any claim to knowledge concerning providence or God's design can at best be speculative. But in carrying out this task he has once more overstepped his own limits. By denying a certain kind of knowledge about nature he has also without any justification denied another sort of knowledge about the realm of freedom, i.e. the normative realm. In the normative realm reason legislates a priori for the realm of freedom. The will is *determined* by reason through the concept of freedom; for such a determination one requires knowledge about this realm. Hence, although the judgement about the purposiveness *of* nature may be a matter of mere reflection producing speculative knowledge, judgement about purposiveness *in* the normative realm is not a matter of mere speculation, it is a matter of determined actions, and one does have knowledge about such actions.

As concerns nature, Kant is quite right in saying that judgement can at best be reflective. We have not after all created the natural world, hence what goes on it is a matter for discovery and reflection. But as concerns the normatively possible world, we do not have to merely reflect on it, we have ourselves created it and men who have done so have mostly declared their purposes. We can actually know what these purposes are, we do not have to speculate about them.

As noted before, Kant himself tells us that there are two types of legislation. When reason legislates for the normatively possible realm the principle of purposiveness cannot be merely regulating our thoughts, it constitutes such a realm. This is so because for such a realm actions and reactions are not merely to be *understood* through the notion of purpose, but purposeful activities are to be done so that various deeds will constitute the normative realm. The use of the teleological principle for the noumenal realm does not generate any speculative knowledge, nor does it remain only a heuristic principle through which the intelligible realm is to be comprehended. The actuality is that the noumenal realm is intelligible because people have performed actions which are purposive, and which are done on the basis of norms. We do not have to regard the normatively possible world *as if* deeds in it were purposive in mutually helpful ways, for here they may or may not be so enacted. The teleological principle for the noumenal realm is hence not just an epistemological principle, it is an objective ontological one. The teleogical principle is just as objectively true for the realm of freedom as the principle that every event has a cause is true for the phenomenal world.

What is this teleological principle for the normatively possible world, the realm of freedom? It needs to be defined.

In the third *Critique* Kant explains that so long as we leave mankind out of consideration we cannot explain why nature even exists. Man and his needs and purposes can form the ultimate ends of nature only because he, unlike other natural beings, can form his own ends and designs. This is so because man is the only being in nature who possesses autonomy of the will, and because in particular man can indeed set before himself as his ultimate objective the achievement of the supreme moral good. 'Only in man, and only in him as the individual being to whom the moral law applies, do we find unconditional legislation in respect of ends. This legislation, therefore, is what alone qualifies him to be final end to which the whole of nature is teleologically subordinate.'[6]

Now if this view is true, and I do think it is, then we have already transcended the situation of the biological sciences. Here we have man whose *telos* we do not have to keep guessing, we can ask him what it is, we can ask ourselves. This is a radically different situation, here man must set before himself his own purposes. The teleological principle is no longer a mere epistemological principle which helps us to guess or opine on what we or others are doing or want to do, it gives actual form to human deeds. It tells us that we must constitute our activities in such a way that every act is reciprocally both end and means. Since the ends are moral, the means have to be moral too; only in such situation 'nothing will be done in vain.' Perhaps nature does nothing in vain, but since we are self-conscious beings we are free either to do deeds in vain or not to so do them. We have to legislate the teleological principle to ourselves.

Hence just as the biological sciences have a teleological principle which is different from the causal principle of the natural sciences, legal science has its own teleological principle which is radically different from that of the biological sciences. It is radically different because it does not just give shape to our thoughts but it gives shape to our deeds in the social world. This is possible because man, being conscious of the *telos* in nature, i.e. being self-conscious of his nature, unlike all other creatures, is free to either follow or not follow the *telos*.

The teleological principle of legal enterprise may be stated as follows: *Attain all moral ends only through moral means, so that every act is reciprocally both end and means.* This principle is the normatively synthetic a priori teleological principle of law. It is a basic legal proposition.

Since morality consists both of ethics, in which moral principles are internally legislated, and of law, in which moral principles are externally legislated, this teleological principle is actually a principle of both ethics and law. For ethics alone it may be read as 'attain all ethical ends only through ethical means'; and for law as 'attain all legal ends only through legal means'. However, the formulation presented above, which covers both ethics and law, is more appropriate since it is a principle which applies both in the present social world and also in the best normatively possible world. In the best world, under the Community of Ends principles, it will be recalled that the ethical and the legal become one and the same, since what a person legislates for himself is also what he always legislates for all. Prior to the attainment of the best possible world, i.e. presently, one may if one wants read the teleological principle specifically for law as 'attain all legal ends through legal means'. But then it must be remembered that in so reading it one is saying nothing other than 'attain all externally moral ends through externally moral means, so that every act is reciprocally both end and means'.

We shall see in the next section what this teleological principle actually entails and involves. It mainly generates what Kant called the 'peculiar causality' of the realm of freedom. Kant, as noted, does not explain or explore the role that the teleological principle plays in the noumenal realm. It is to this 'peculiar causality' that we must turn next. But before we do that it will be important to end this section with a few relevant remarks on Kant's *Critique of Judgement*.

Both the intent and the content of the third *Critique* have been matters for debate.[7] This is partly because, as I have suggested, Kant himself seems to have caused the confusions. His main aims in the third *Critique* seem to have been twofold: first, to rule out speculative discourse about purposiveness in nature; and second, to provide an answer to Hume's scepticism about making legitimate inductive generalizations from particular observations. Kant's answer seems to be that there are synthetic a priori principles in both natural and biological sciences on the basis of which legitimate inductive generalizations can be made. In raising problems about induction, Hume was interested in explaining our knowledge about nature, and so is Kant. But in doing so, as I have argued, Kant seems to forget that there is something more at stake than biology and natural sciences; the legitimacy of inductive generalizations in the social sciences, in the realm of freedom, has also to be explained. Perhaps Kant does not discuss the teleology of the realm of freedom because he thought he had already done so, six years earlier, in the *Essay Towards a Universal History from a Cosmopolitan Point of View.*[8] There he had discussed the progress of civil society in terms of the *unsocial-sociability* of man, i.e. the desire in man for both privacy and community. However it is difficult to say whether Kant had this essay in mind while writing the third *Critique*.

The net result of the discussion of teleology in the third *Critique* is to reinstate man in the centre of the conceptual scheme in terms of which the rest of the universe can be explained. In telling us that the final purpose of nature is to produce man and through man the ideal rational community, and in asserting that it is only in this way that the working of nature can be understood, Kant is putting forward none other than what has recently been called the 'anthropic principle' or the 'reality principle', a principle which states that reality can be understood only by considering man's role in it.[9] We have already had occasion to discuss this issue in Section I. The anthropic principle of the third *Critique* raises serious doubts about Kant's conception of his work as a Copernican revolution. A discussion of this issue is evidently a matter for another occasion. The limited implication of the anthropic principle for the social realm must, however, be explored here.

Kant's concern in the third *Critique* is to show where the capacity of reasoning stops and where speculation begins. However, as noted, even if we grant that speculation about the *telos* of the factual world is illegitimate, reasoning about the *telos* of the normatively possible world need not be speculative. In such a world the anthropic principle can be directly applied because we ourselves choose and set the *telos*. Reason is used in its practical capacity to determine the *telos*. The 'peculiar causality' that is involved in the teleology of the noumenal realm, i.e. the social order, when practical reason is applied to it, must be explained. I shall now proceed to discuss what sort of 'causality' is involved in actions in the social order.

IV THE LEGAL COURSE OF ACTION

The principle of legal teleology generates the notion of a legal course of action. This notion is fundamental to an understanding of the legal enterprise.

The notion of a normal course of development in the normatively possible world is qualitatively different from the notion of the process of a causal chain of action and reaction that occurs in the factual world.

The significance of the notion of a normal course was noted while discussing the concept of a legal individual and also the concept of co-operation. In what follows I shall examine the notion of a normal course, first from the perspective of an individual and then from the perspective of a group or community. It will be necessary to examine both the meaning of a normal legal course and the concepts in terms of which the notion can be made intelligible.

The notion of the normal course of legal action is prior to the creation of the positive law because the latter has to be created through a legal course of action, otherwise it becomes a system by fiat or force. Let us see what such a course can be.

IV. i *The Individual's Course and the Individual's Deviance: The Issue of Amending a Person*

If our aim is to do morally good acts and if we adopt morally good means to achieve this end, then we have already done a morally good act while enacting the means to it. This is the only way in which morally good acts will always be done whether or not we are able to achieve the intended ends. The achievement of an intended end may or may not be possible for us; hence the teleological principle tells us that every means adopted should also be viewed as an end in itself, and as such it must be moral in the same way as the intended end. That is, every act is both a means to a certain moral end and *also* an end in itself. (Of course means must never become *only* ends in themselves.)

The teleological requirement, together with the transcendental requirement that every agent has a duty to create and sustain the normatively best possible world, generates the notion of a normal legal course that leads from the normatively worst possible world, i.e. the state of nature, to the normatively best possible world. It generates the idea of a continuous series of actions rather than an isolated moral act.

While discussing the concept of a legal individual we saw that the notion of a normal legal course arises when we consider the possibility of moral or rational progress. The idea that an imperfectly rational will can become a perfectly rational will or a holy will involves, as Kant argues, an idea of the immortality of the soul, the idea that the personality of the person is continued. Law is not concerned with immortality, but it is concerned with the fact that while each person is living it should be possible for him to make the desired moral progress. Law does not dictate but it expects that each person will either attempt to realize his moral end or will, at least, not work against it. Through its various codes law attempts to outline the permissible courses of actions, and thereby protect the possibility for the actualization of legal teleology.

When considered from the point of view of the community the notion of a normal course of action defines the normal path which a community must necessarily follow if a continuity is to be maintained. At any given time there is a certain understanding about what constitutes a legal course of action for an individual and a community and also what constitutes a deviation from it.

The substantive aspects of the legal course are defined by the transcendental, the metaphysical and the teleological requirements, together. Those actions which actualize the ideals of the normatively best possible world form the central channel of the normal legal course; those which at least do not go contrary to such ideals form the permissible deviations; and all those actions which violate the realization of the ideals fall outside the legal course, they are the abnormal or entirely deviated actions.

The teleological requirement demands that all legal ends be achieved through legal means. When actions are done in this way they are bound together in a series which is not causally related but *teleologically* related. From the individual's point of view the actions are intelligible as a chain of purposive actions aimed at becoming a perfectly rational will; from the communal point of view the actions are intelligible as a chain leading to the best world. A series of deeds which are not causally connected but which still form a series, since they have been enacted for the same *reason*, evidently does not belong to the factual world but to the noumenal, i.e. the normative realm. This explains the 'peculiar causality' which Kant mentions when considering human actions.

Now such a series of deeds, which is intelligible in terms of norms and conceptually related through reason in the noumenal realm but not causally related in the phenomenal realm, is what Indian philosophers have called *karma*. One's *karma* is the series of deeds which one has performed in the noumenal realm and which is intelligible only normatively.[10]

The notion of *karma* is associated with the notion of reincarnation. From the individual's point of view the notion of continuous moral progress, as Kant noted, requires the continuation of the self as a soul. This continuation is supposed to be somewhere outside the world. Indian philosophers have similarly thought that for moral perfection a continuation of the self is required. However they have not conceived of this continuation as somewhere outside the world, but as within the world itself, in terms of being born again at the same level of moral perfection which one had achieved in the last life. Moral progress thus always continues within the world and not outside it. However, in so far as law is concerned, just as it is not required to concern itself with the immortality of the soul so it is not required to concern itself with the reincarnating *ataman*. Law is directed only at the present embodiment of the self.

The notion of *karma* in Indian tradition has sometimes been confused with various ritualistic and religious notions. The notion itself is neither ritualistic nor religious; it is an a priori notion of reason which tells us that different human deeds form a series (leading towards either moral perfection or degeneration) and that the series is intelligible in a normative discourse, not a factual discourse. When the idea of law is approached through the notion of *dharma*, the notion of *karma* would have to be purified of its religious and ritualistic overtones. Here it will suffice to mention the task. In explicating the notion of a normal course of action, however, I have also explicated the notion of *karma*, they are one and the same notion.

Law is, then, eventually based on a *karmic* theory. It requires a fundamental notion of a normal course of action. Law's aim is thus to see to it that the course of one's actions remains the legal course of action. In other words it sees to it that one's *karma* follows the *dharmic* path.

Although philosophers of law have not discussed or explicated the notion of a *normal legal course*, i.e. the *karmic* path which is central to the working of the legal enterprise, lawyers and jurists have nonetheless directly or indirectly employed the notion in actual practice. According to the thesis argued here they would naturally be led to such an employment in the process of the development of law, if they have not already discovered it. This is so because the notion of a normal course is implicit in the idea of law. It is only on the basis of the notion of such a course that many current legal practices become intelligible. For example the practice of evaluating or punishing a person on the basis of his past *record* instead of a single isolated act is understandable in terms of the idea that what law takes into account is the whole course of a person's acts, his *karma*, rather than one particular act. In fact if we understand the teleology of law we would be judging every person in this way rather than attempting to punish people for isolated acts. The teleology of law directs us to take into account the whole series of acts, or as much as we can find out, when judging or evaluating a person; what has to be considered is whether or not the person has been following the course which leads to the normatively best possible world, and if he has deviated from it whether the deviation is within the permissible limits.

In fact the very idea of deviation and reform which is talked about so much these days becomes meaningful only on the assumption that there is a non-deviant way of acting, that there is a proper form of action. To attempt to reform someone or to correct their deviance is not to seek amendment in one isolated act, it is to attempt to bring the person back to a proper moral course of action.

Similarly the whole of tort law, for example, is based on the notion of non-tort, i.e. a non-distorted *line* of actions. To know a *distorted* line of action one has first to know the proper course of action. When actions are distorted they become the types of actions which do not fall in line with the legal course of action. Law then attempts to reconstitute the state of affairs so that the conditions under which the normatively best possible world can be actualized are brought about once again. The main aim or thrust of law in a tort case is to reconstitute the conditions for the best world and not to reform a particular individual to act as a member of the best world. The latter is the main aim of the criminal law.

The notion of strict liability, to mention a last example, can also eventually be justified and understood only in terms of an appropriate course of legal action leading to the normatively best world. The central concern in sustaining the idea of strict liability is to express the central legal point that the main aim of law is to maintain the conditions and possibilities for the best world. Since this is the primary aim there are no excusing conditions in certain cases, the conditions simply must be restored. Finding out who is responsible for misdeeds is of course important because someone, after all, has to restore the conditions for working towards the actualization of the best world. But although the location of the person who will restore or compensate for the situation is important, it is not the motivating ground for stipulating strict liability. The motivating or the justifying ground for stipulating strict liability is the the legal aim of protecting the conditions for the actualization of the best world, wherever possible. The notion of strict libility is just one device to effect such an actualization. As law progresses we must expect many more such devices to be forthcoming.

So far I have been discussing reforms and corrections of individuals and some particular situations; but what about the reform and correction of a large group of people? Does the teleological principle become different when applied to groups? Evidently not, for the teleological principle concerns actions in general, whether they be done by an individual or a group. It does not depend upon how many people are doing it, but upon what actions are being done. Hence the teleological principle applies exactly in the same way to one person as it does to many, even if the 'many' be the ones who form the association called government, or the elected legislators of rules. I turn now to a discussion of the question of amending or reforming group deviance.

IV. ii *The Group's Course and the Group's Deviance: The Issue of Civil Amendment*

The teleological principle of law requires that all legal ends must be attained through legal means. Since legal means are ones of cooperation and reasoning together, it follows that all amendments in the social structure, institutions and in civil society in general must be attained by co-operative means. Amendments within the body of the legal system or of public offices are in fact brought about many times in this manner. There are specific amendment procedures within law which direct the people to change, even some parts of law, by co-operative means. Smaller legal amendments are often brought about by the courts in some similar co-operative manner. But what happens when a group of people or a majority of people thinks that the political party or the legislators which form the government are acting contrary to legal ideals and principles? Even in such a case the teleological principle does not authorize people to act illegally or violently. It still says: attain legal ends through legal means. Since legal means are ones of co-operation, in this case what they must do is *not* co-operate with the people or the group who they consider to be acting illegally and co-operate only with the people or group who in fact they take to be acting according to legal ideals and principles. In so doing they will be *non-co-operating* with the political party or the legislators in charge and co-operating with some other people. That is, from the point of view of illegally acting legislators or governments, they will be non-co-operating, but the same actions will constitute co-operation from the point of view of legally acting people. In this non-co-operation the people who dissent will still be acting according to all the legal principles and ideas. Non-co-operation is thus the only amendment method which the teleological principle of law provides in such a situation, whether the amendment be large or small. Non-co-operation, it must be emphasized, is not acting violently against people who are acting illegally: this the law can never allow. It is only co-operating with a different set of people who are acting legally. The test of whether one is acting legally or not is clearly provided by the propositions of pure practical reason, as spelt out in the course of this work. All legislation, by whatever method it has come into being, must not contradict the basic legal propositions of practical reason, if it is to be law. Its legality does not depend only upon whether or not the appropriate people have legislated it. This issue will be discussed in the next section.

Co-operation and non-co-operation are thus not opposite ways of acting. Both involve co-operative ways of acting; the 'non' signifies that the class of people with whom one was co-operating earlier is now different.

Non-co-operation may take the form of a minor local work strike or a major civil movement, all of them are governed by the same principles of legality. They are all rational, co-operative and non-violent. Non-co-operation, as Gandhi rightly called it, is *satyagraha*. *Satya* means truth and *agraha* is benevolent persuasion.[11] *Satyagraha* is thus benevolent persuasion based on true principles, i.e. on truth. True principles or the truth are the synthetic a priori propositions of pure practical reason. *Satyagraha* is thus the only method which human reason warrants to be a legal method. The efficacy and the practicality of *satyagraha* has already been tested in large-scale social changes. This has been done most notably by Gandhi himself, but small-scale *satyagraha* is ubiquitous, we often act in this manner in our daily life.

Although *satyagraha* is well understood from the point of view of activism, its theoretical basis has been unclear. I have attempted to show its appropriate philosophical basis by explicating the true propositions of human reason to which *satya* refers, and the meaning of co-operative activity to which *agraha* refers.

The practice of attempting to amend the behaviour of legislators has been confusedly termed civil disobedience by legal positivists. This term is a misnomer because it rests on false assumptions about law. It assumes that people are obeying the law when, as we have seen, the truth is that people are autonomously following the law in so far as it accords with the demands of reason. The term 'civil disobedience' thus has its basis in the imperialist ideology where people are commanded to obey the law.

What we need therefore is a neutral term to refer to civil action, for it may either be legal or illegal. The term 'action for civil amendment' seems to me to be more appropriate. The legality of the action for civil amendment can be judged independently of positively legislated rules.

This completes the essential characterization of the notion of a normal legal course. I turn now to the discussion of two important conclusions which emerge directly from the notion of the normal legal course or *karma*. The first concerns the grounds for fundamental human rights and the second the plurality of methods which accord with the teleology of law.

V GROUNDS FOR FUNDAMENTAL HUMAN RIGHTS

Looking at the United Nations Universal Declaration of Human

Rights one may wonder why it is so long and not any longer! Why does the list include the right to self-determination, civil liberties etc., and not many other rights. How many rights must it necessarily include and why must it include only those particular rights? Legal codes of nations, too, have a list of rights, such as to free speech, worship, locomotion, education and so on, but why must it include only these and not others? In other words, is there an organizing principle behind all these various rights which are enumerated in various codes, or is the list arbitrary?

It is not clear if the authors of the Declaration or the Charter or other similar legal codes had any specific subjective principle in mind while enumerating these rights, at least the documents do not specify any such principles.

What we evidently need is a principle on the basis of which all those rights mentioned in the Declaration and other documents, and many more which may be discovered in the future to be necessary, can be rationally generated. That is we need an objective generative principle for rights.

The transcendental principle that every human being has a duty to create and sustain a legal system by acting in accordance with the principles of the Community of Ends, and by actualizing the ideals of the normatively best possible world, together with the teleological principle that all actions so done must be reciprocally both ends and means, provides precisely such a generative principle for rights. The principle may be formulated thus:

Every human being has all and only those rights which are necessary to make it possible for him to fulfil his duty of creating and sustaining the normatively best possible world and acting in accordance with the principles of the Community of Ends such that the actions made possible are both ends and means.

This is a basic normatively synthetic a priori proposition of law. It tells us that every human being has a right to all that is instrumental in letting him or her fulfil his duty, but this formula by itself does not, a priori, tell us what these rights actually are. This discovery is a matter of further conceptual analysis, together with the empirical observation of human and social conditions. We find for example that having knowledge is instrumental in being able to fulfil one's duty, so is being able to work, express oneself freely, protect one's body, belong to a legal jurisdiction, and so on. Hence a person has a fundamental right to all these. Although the list is always open for adaptation to the context, there are evidently some necessities which are common to all contexts for being able to fulfil one's duty, such as being able to live, express oneself, work, etc. Such necessities require the derivative rights to everything that is instrumental in the actualization of these necessities, such as the right to education, the right to sufficient economic means (which may be translated as the right to property or right to a minimum wage, depending on the social context) and other instrumental necessities such as the right to medical services and the right to legal aid. The required rights cannot be (and need not be) decided all at once because in different social and historical conditions we may discover different sorts of requirements which are instrumental in being able to fulfil one's duty; but on the basis of the generative principle it will always be possible to include specific rights which need to be emphasized in that social and historical situation. However it must be remembered that although the list is open on the basis of the generative principle, ple, it is not arbitrary or a matter of fiat or decree: the direction and the scope are very strictly limited and defined. It is an aspect of what law itself is—an open cybernetical juristic normative system. The inclusion of rights has a defined teleological limit and direction.

The ground for Fundamental Human Rights, thus, is Fundamental Human Duties which are involved in the teleology of law. It is only by understanding the teleology that we can make the notion of necessary rights intelligible. The rights are *necessary to* the human and legal teleology. They are necessary because they are instrumental in being able to fulfil or actualize legal duties.

It is important to notice here that all rights are derived on the grounds of the transcendental duty and the teleology of law, hence the notion of duty is conceptually prior to the notion of right. The duty is unconditional, the existence of the right is conditional upon the fulfilment of the duty.

The last point needs to be explicated. We may of course say that theoretically people have some specific rights, but the empirical effectiveness and actualization of what these various rights assert is conditional upon the prior empirical effectiveness and actualization of what the duty asserts. Only when the duty to create and sustain a legal system has been fulfilled by a community or a person can there be a possibility for the actualization of what the various rights assert. A person, for example, who has never expressed himself freely, and has thus not done his duty in creating and sustaining the legal system, has only a theoretical right to freedom of speech, it has never been actualized. For him to defend his right to freedom of speech or for others to defend it can only become an *actual* issue if the person has spoken freely in the first place. Similarly a person who has committed crimes and is in jail can only claim in vain that he has a right to education. For such a right to be actual and not just possible a person would first have to do his duty towards the best world. He would actually have to educate himself and thus make himself more rational, wherein his right to education would have been actualized.

Similarly a community which has not done its duty to create and sustain the legal system cannot expect the actualization of various legal rights. A society which is rendered chaotic by internal civil disorder and strife, or which is in a habit of living by the command of a dictator rather than by reason, can hardly expect what the various legal rights assert to be true for a society. The possibility of the actualization of what the various legal rights assert presupposes the actualization of fundamental legal duties by the community.

What we have to argue and contest for therefore is, first, the fulfilment of *fundamental human duties* defined by the principles of the Community of Ends, and second, for the actualization of the ideals of the normatively best possible world. The minimal content of these duties can be expressed by the proposition that what is first of all required is the fulfilment of the duty to create and sustain a legal system if we want the *fundamental human rights* to really actualize themselves in any society.

Thus, although the United Nations Organization may use all its means to propagate the notion of fundamental human rights and may try its best to persuade everyone that basic human rights must be respected, all such efforts would remain empirically ineffective, especially where the effects are most required. What it must, first of all, tell everyone about is fundamental human duties. It must see to it that the legal system is understood and established everywhere, so that the actualization of human rights becomes possible. That is, the United Nations must aid and direct every community in fulfilling its basic duty—the duty to create and sustain a legal system. Only a legal system can provide the conditions in which the propositions of human rights can become true propositions.

The preceding account attempts to give a new orientation to the traditional natural rights theory. In fact in so far as it directly relates the teleology of the community—towards the best world, with the teleology of individuals—as *atamans* progressing towards greater rationality, it provides an account of rights which is not only justified within an unified theory (about society and individuals) but which also explains the correlation of rights with basic duties. Such an unified theory, in which the fundamental rights are shown to be arising from the very nature of legal enterprise and not some extra-legal factor, seems to me to be a more satisfactory justification of rights than the traditional Lockean and other natural rights theories. Perhaps it is the only satisfactory justification for human rights, given that a legal theory must take into account both the demands of the individual and of society.

Locke takes the Biblical account seriously and eventually seeks the justification of natural rights in the divine will. He justifies the basis of such rights by an appeal to an extra-legal transcendent scheme in which the right to property is one of the basic principles. The acceptance of such a justification finally becomes a matter of faith or dogmatic belief and goes beyond the domain of rational epistemology which can be accepted outside Judeao-Christian religious tenets. The account of human rights presented here frees itself of all religious beliefs. It involves concepts which are available for rational analysis and debate, irrespective of all religious dogmas.

Non-unified natural rights theories—such as those which base themselves on social aspects alone—often appeal to political dogmas like contract, covenant and social compact. Such justifications for rights are to be found in Rousseau and Hobbes. We have already seen what difficulties such a priori sociologies are faced with, including the error of using legal notions to explain the genesis of law. Appeal to such supposedly historical or ahistorical facts does not amount to an appeal to the transcendent, but in the final analysis it does require acceptance of political dogmas which must again be a matter of faith or a belief of convenience. As pointed out, the justification of human rights does not depend on extra-legal political factors. Its justification is self-contained and can be purified of all religious and political elements.

The question about the existence of law will be dealt with in detail in the next section. I will finish this section by drawing a final conclusion.

VI THE PLURALITY OF LEGAL METHODS

Since all that we know a priori about legal teleology is that the means as well as the ends adopted must meet the juristic conditions, the empirical question about what actual methods will be adopted in different social situations for different social purposes, which are within the bounds of the juristic conditions, cannot be decided beforehand. That is, the teleological principle allows for a legal pluralism in methods. It cannot be said therefore that only adjudication, for example, is legal procedure. Mediation, conciliation and election, for instance, are equally legitimate legal methods. They are distinct methods necessary for solving very different types of problems and needs. Other problem solving procedures may very well be invented or discovered in the future, and those which are necessary now may not be so important at another historical stage with different social problems and issues.

Since the particular method which is taken as most important depends upon social needs and problems, we cannot assert that a particular society is or was legally primitive or advanced merely by considering its legal methods. To appraise a society all other legal principles would have to be considered and one would have to find out to what degree the various basic legal propositions are actually effective in the society. Thus the mere fact that a society solved its problems through mediation and did not practise adjudication does not make it primitive; nor does the fact that another society practises adjudication make it legally advanced.

As we can see now, Fuller's insistence that a legal theory must account for legal pluralism (which was noted in Part II)[12] is not without substance. The analysis of this section has not only described legal pluralism but also attempted to show its basic philosophical foundations. Legal pluralism in method, which is within the bounds of the juristic requirements, is not only possible but also necessary given the diversity of our social problems and needs.

I proceed now to examine the fourth and the final requirements of law, namely legislative requirements.

SECTION IV
THE LEGISLATIVE REQUIREMENTS OF LAW

I THE LEGISLATIVE REQUIREMENTS OF LAW

The legislative requirements of law are those practical necessities on fulfilment of which a possible system becomes actually efficacious. To start with there are two such basic practical requirements. First that a number of rules be presented which can be possible candidates for becoming laws; and second that such rules be applied to the community as laws.

The first requirement can be further simplified as consisting of two elements: i) there be a body of men who present or create the rules; ii) such rules satisfy the requirements under which the rules become laws.

Similarly the second requirement can be further simplified as consisting of two elements: i) the rules be classified so that they can be applied (this requires a division of laws); ii) there be a certain specific body of men whose statements are to be taken to be the final verdict on how the rules are to actually apply in particular situations (this evidently requires that there must be judges whose role is fairly well determined).

As concerns the first requirement—what kind of men create a body of rules—most books on law rightly point to customs, common practices and to political representatives as the 'sources' of such rules. The further requirement concerning the conditions that must be satisfied so that the created rules can become laws is not just a matter of identifying the sources. It requires spelling out and justifying the criteria on the basis of which the identified rules can be taken to be laws. The issues concerning such criteria shall form the first part of the discussions to follow.

The second legislative requirement mentioned above demands individuation of laws. Law is usually divided into public and private law. Each division has further subdivisions. What justifies such divisions? An inquiry into the basic reasons for such divisions will form the second part of the discussion in this section.

The second legislative requirement also makes it necessary that judges apply the laws to society. A discussion about the role of the judges will form the third and the final part of this section.

II. i *The Existence of Rules*

Let us consider the first question: what kind of men create the rules which can become laws?

It seems to be generally agreed now that only the will of some specific people, the legislators, can be instrumental in creating rules which can become laws. The common law tradition, however, recognized common practices and customs as sources which can present rules. These rules were willed by some arbitrary (unknown) individuals. In recognizing the primacy of specific legislators; has the common law tradition moved away from its basic understanding? Even in the civil law tradition the body of law came mostly from prevailing practices. In recognizing political legislators as the only people whose will is involved in creating law has the tradition moved away from the basic belief that the will of the people has to be involved in the creation of laws? This is not so, for from the perspective of political theory we must remember that political legislators are supposed to be representatives of the people. In so far as they are assumed to be representing the will of the people, the will of each person is still instrumental in creating the rules, albeit only indirectly now.

Thus from the point of view of law the answer to the first question—whether rules willed by any person can be candidates for law—is yes. Although law always demands that the will of all be involved in communal legislation, such a demand can evidently remain unsatisfied if political legislators are not true representatives of the people's will. One must organize society in such a way that the will of all is truly represented by the will of some. But how this is to be done is a political question. Legal theory cannot provide an answer to this.

It need not be assumed a priori that any one political theory or system provides the right or best answer to the legal demand that the will of all be instrumental in the legislation of external morality. The best arrangement by which the will of the people will be expressed by a chosen group of people will vary in societies. It will depend upon various cultural, historical, economic and other factors. The inquiry into this issue is a concern of political theory and hence need not detain us. Its relationship to legal theory, however, is important to note.[1]

One may legitimately ask how we know whether the method of choosing political representatives creates a legitimate body of men who can legislate rules? The idea of law, as shown, is independent of and prior to that of a political system. Basic legal principles, on the basis of which further laws can be created by the political system, are prior to the creation of any political party. If the methods followed to create a body of men who will be legislators do not violate the basic synthetic a priori legal propositions, then they would be legally legitimate methods. Election is one such procedure which works in accordance with the basic propositions of law. The basic principles of election are grounded in the teleological principle of law, namely that to achieve good ends only good means are legitimate. This, as we have seen, is a principle of *satyagraha*.

From the fact that we have a legitimate body of men who present us with rules, can it be inferred that whatever they present can become law? Legal positivists have assumed this to be so, but such an assumption cannot be made. For to accept this is to assume that legislative conditions are the same as metaphysical conditions for the existence of laws. This, as we have seen, is not so. The exact conditions for the effectiveness of laws must now be specified.

II. ii *The Existence of Laws*

A rule may come to exist as a law if the agents act in accordance with it. But under what conditions can they so act? (One must not speak of obeying the rules because that suggests that the agents are not autonomous and the rules are commands). The people can act in accordance with the rules if they are *reasonable*. The rules will be reasonable only if they do not contradict any synthetic a priori legal propositions of pure practical *reason*, namely the transcendental, metaphysical and teleological principles of law.

If we call the legislation of rules by a legitimate body of men the *validity* condition, then the point of the argument above is that the *existence* condition of rules as laws are not the same as the validity condition. The existence condition and the validity condition are met in two entirely different ways. The validity condition for a rule is grounded in *human will* being instrumental in a legitimate way, i.e. there must be a legitimate will for a legitimate rule (valid rule). But the existence condition is grounded in the way *human reason* applies to the normatively possible world. For a valid rule to come into existence as law it must not only meet the conditions of human will but also the conditions of human reason.

A particular rule would thus have to meet the following requirements before it can come into existence as law:

i) It must be a valid rule. (A valid rule is any rule willed by the people or its legally chosen representatives).
ii) The rules must not contradict any principle which will prevent it from becoming actual. (That is, it must satisfy the transcendental, metaphysical and teleological requirements).
iii) There must be acts done in accordance with the rules.

If conditions ii and iii are missing then there would only be valid rules, not laws. If even condition i is missing then the rules can at best be fiats, decrees or commands, they would not even be valid rules. Condition iii partly presupposes condition i, i.e. for the people to act in accordance with the rules there must already be a body of rules created by the people. It is only partly presupposed because for people to act in accordance with the rules it is not necessary that they be indirectly legislated through political representatives. So long as people have willed the rules which have been accepted, there would be rules in accordance with which people can act. Given this, if only conditions i and iii are present what we get is customs or common practices, not yet laws.

However, since condition iii partly presupposes condition i, if we have only conditions ii and iii we have once again laws and not just rules. That is, if all the customs and common practices of a society are such that they are in accordance with the existence conditions of law, i.e. condition ii, and if people are acting in accordance with it, then the laws exist. This means that it is not necessary to have indirect representation of the will through political legislators to have laws, they could be created and sustained entirely through custom and common practice. But this is evidently an idealized situation. It is precisely because custom and common practice conflict that we need political representatives. What conditions ii and iii together tell us is that the need for political representatives is an accidental feature, it is not an essential feature for the validity of rules; other ways could be found to get the will of the people instrumentally involved in creating a body of rules. We must thus distinguish between what is politically necessary, namely the indirect representation of the people's will through some chosen men, and what is legally necessary, namely the creation of the rules by the people so that the rules can exist as laws.

The failure to distinguish between the political and legal requirements is the central shortcoming of legal positivism. It mistakes the requirements for valid rules, the expression of which is a political problem and requires a political theory to justify indirect legitimate expression of the people's will, with the requirements of the existence of laws. In short legal positivism confuses the validity conditions with the existence conditions of laws.

One clear example of such a confusion, to start with, can be seen in Kelsen. Kelsen distinguishes the validity of a norm from its effectiveness. A law exists for him, he says, only if it is effective. But then what does effectiveness mean? It means, he tells us, that the laws should in fact be acted upon by most or some people. If they are so acted upon then the laws exist. But then what does validity mean? Kelsen tells us it means that the laws exist. Since for Kelsen validity means that law exists and effectiveness also means that law exists, at times he is led to argue that law exists when it is valid, and also at other times to argue that law does not exist even if it is valid because it is not effective. The following quotations, all of which belong to the same section, reveal this confusion:

> By the word 'validity' we designate the specific existence of a norm .... The existence of a positive norm, that is to say its 'validity'—is not the same as the existence of the act of will, whose objective meaning the norm is .... Since the validity of a norm is an *ought* and not an *is*, it is necessary to distinguish the validity of a norm from its effectiveness .... A minimum of effectiveness is a condition of validity .... A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed .... Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity

It is evident that Kelsen's assertions do not at all make it clear which way the relationships hold and what these relationships are. He is led into such obvious contradictions because, after positing three distinct notions, that of existence, validity and effectiveness, he, like other positivists, confuses these notions.

In Hart's analysis this confusion appears in a different way. Hart asks: what does it mean for a rule to exist? He answers this in terms of 'acceptance'. Acceptance does not mean mere moral approval or a feeling of being bound. It must also be the case that the rules are complied with and that a deviation from the rule is a fault open to criticism. As noted before, to have such a critical attitude is to have what Hart calls an internal point of view.[3] According to Hart, thus, a law is said to exist if it is accepted with an internal point of view. He tells us:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.[4]

In defining the existence of the legal system in terms of acceptance of valid rules Hart is not providing us with any independent criteria for the existence of law. The notion of acceptance that he mentions applies to normative systems in general. Even the rules of grammar of a language are accepted with an internal point of view. The important question—the answer to which will distinguish the existence of laws from other rules—is not raised by Hart. This is the question: can the members of a group accept any rule or are there conditions which make it impossible to act in accordance with the rules without violating some basic principles of law? As argued, not every rule can be accepted and made to exist as law. Apart from material and formal conditions, there are legal conditions which need to be satisfied.

Although like Kelsen Hart clearly realizes that there are three distinct notions—validity, existence and effectiveness—he conflates these distinct notions by equating both validity and effectiveness (acceptance) with existence. That is, Hart asserts that if a rule is valid then it exists; he also asserts that if a rule is accepted then it exists. As a consequence of this equation, after inquiring into the conditions of validity (and equating these conditions with the existence of laws) Hart does not inquire into the conditions for the acceptance of laws (since he asumes these have already been defined by the conditions of validity).

Our concern however is not limited to Hart's and Kelsen's confusions between validity and existence. It applies to legal positivism in general. Positivists commonly (and rightly) claim that 'the validity of law is one thing and its existence another', but as it turns out no positivist actually follows the consequences of this proclamation. Having made the claim they also go on to maintain that every valid law exists, i.e. the validity of law is one thing (and since every valid rule exists as law according to the positivists) its existence is the same thing. A theory consistent with the belief that the validity of law is different from its existence would show the difference by providing distinct criteria for these notions.

In conclusion, then, since a rule must not only satisfy the validity conditions of our will but also the existence conditions of our reason so that we may be able to accept it and act in accordance with it, it follows that only that is law or can be law which ought to be law. Any arbitrary rule cannot be willed and accepted in practice to exist as law.

If law is only what it ought to be, how do we characterize the different institutions which presently take themselves to be legal systems? The appropriate characterization would be that each of these systems are legal systems to different degrees. What presently goes under the name of a legal system is actually a very complex institution consisting of some laws, some valid rules, some conventions, some common practices and even some illegal political practices. The difference between the various systems, which are presently called legal systems, is in the composition of these elements. In an actual legal system all valid rules and norms will be laws. It must be emphasized here that in arguing that there is a difference of degree in the legality of the present institutions I do not mean to say that the contents and the limits of a legal system can be stretched in any way. The contents and the limits are set by the basic principles of law and any system that violates these principles ceases to be a legal system. The differences in the present institutions arise only due to non-legal elements, such as rules, conventions, etc.

III GROUNDS FOR THE INDIVIDUATION OF LAWS

Law can be divided into classes in a number of ways. Within a legal system the division of law has at least two practical objectives: first, the creation of a conceptual scheme that will enable the rules to be so interrelated and so effectively and succinctly stated that they may be more easily understood, applied and developed; second, the creation of an order that will enable lawyers and judges to find and cite laws with greater ease. The question about *how* to classify laws cannot be appropriately answered without understanding *why* laws are to be classified in a particular way. This latter question belongs to the philosophy of law and it is this question that I attempt to answer in this discussion.

Traditionally legal rules have been classified from the point of view of their purpose, according to their logical form, according to their source of origination and even from the point of view of legal education.[6] However the Roman distinction between *jus privatum* and *jus publicum* has been accepted as the most fundamental distinction in the *corpus juris*. Public law is taken to comprise the rules which specially relate to the structure, power, right and activity of the state. Private law includes all those rules which specially concern the subjects of state in their relationship to each other, together with rules which are common to the state and its subjects. Besides public and private law, the third main division has traditionally been the law of procedures. Private law is usually divided into the law of property, the law of obligations and the law of status or persons. Under public law comes constitutional law, administrative law and criminal law. Writers have differed on the details of the actual classifications. Sometimes there have also been major differences: for example Salmond placed criminal law in the division of private law,[7] whereas Paton and other recent writers place it under public law.[8]

What are the basic grounds for such divisions of laws? If both constitutional law and criminal law are to be placed in the division of public law, is there any essential difference between them in terms of classification or individuation of laws? That is, although both a constitutional law and a criminal law are to be individuated as belonging to public law, on what grounds are they to be distinguished within public law? The same question would apply to other branches of law. For example if both the law of obligations and the law of persons are to be placed under private law, on what grounds are their differences to be justified?

A classification of laws in terms of the relationships that obtain between the individual and the state or between the individuals themselves no doubt provides us with a necessary criterion to individuate laws, but such criterion is not sufficient. For example, on the basis of this criterion alone we cannot distinguish between constitutional law and criminal law. It is necessary therefore to look deeper into the basic grounds for the divisions of laws.

It has been noted that all legal propositions are descriptive, they are not 'ought' statements or commands. Since legal propositions are descriptive it is necessary to ask what they are describing. What they are evidently describing are the states of affairs of the normatively possible world. Only when we realize that the essential characteristics of such a world must naturally be reflected in the legal discourse can we begin to understand the principles behind the division of the discourse.

Since law strives for the normatively best possible world the *corpus juris* must first describe the states of affairs in the normatively *best* possible world, and second the states of affairs that *do not* belong to the best world. This provides the first major grounds for the divisions of laws.

The states of affairs in the best possible world are described in constitutional law. The description depends upon the *knowledge* that the constitution-makers have about such states of affairs. Some of this knowledge may be expressed in terms of the freedoms, duties, rights, liberties and the equality and independence that the people have. Propositions, such as that we have freedom of speech, political and economic freedoms, or that we have fundamental rights, etc. are either partially true or not at all true in the present state of the normatively possible world. The variation is a matter of degree from one legal system to another. In many ways we are not really free or independent or equal. But these propositions and other similar propositions of the constitution are not describing the present normative world. They are describing the best normative world in which all these propositions are indeed true. Since we have not created the best world as yet, these propositions presently appear to us as ideals, but in the best world they will be ordinary and true propositions. We have to strive to make these propositions true (which would amount to the same thing as creating the best normatively possible world). The conception of utopia or the ideal state is already contained in the notion of a legal system, it is not an external or additional notion that human beings sometimes mention. It is only when we understand the constitution in this way can claims such as that of Eugene V. Rostow—that the present legal codes describe the ideals to be achieved—be made intelligible.[9] If a metaphor is permitted, the legal constitution sets the stage on which moral deeds can be enacted to create the normatively best possible world.

The present constitutions do not describe the best world exactly, but in terms of the synthetic a priori legal propositions some can be taken to be describing it better than others. Those which violate the basic legal propositions, evidently, do not describe the best world. However since the necessary legal propositions tells us only the a priori conditions for the best world, the actual details are left open to discovery as we progress. Each constitution must hence keep improving so that it gets nearer to the description of the best world. Such improvements normally occur in the course of the various amendments to the constitution.

The second aspect of the first major division of the legal edicts, as noted, describes what are not the states of affairs of the best possible world. This description is in fact what criminal law is all about. Criminal law describes those conditions and actions on the occurrence of which a person is taken to have steered himself off the normal course which leads to the best possible world. That is, it tells us what sorts of actions do not belong within the boundaries of the legal course. Criminal law thus consists of a description of the elements of the worst possible world, specifying in detail the persons, artifacts and feats which belong to it. Its second correlated function is to describe what must be done when people have deviated from the legal course so as to get them back on this course, and thus once again to make possible the conditions for the normatively best possible world. People's deviation from the wrong path may be corrected through reform, rehabilitation, appropriate education, etc. As society progresses towards the best world and as criminal law develops, legal teleology will necessitate discovery of measures which will use reason in bringing people back to the normal legal course rather than of measures which will use force and cause them physical or mental pain. Attempting to rehabilitate or reform a criminal is nothing other than to attempt to make him act in accordance with the basic principles of law, such as treating each other as ends and never solely as means, etc. In the normatively best possible world since everyone would already be acting in accordance with the basic legal propositions, such reformative conditions would not be required. The criminal law would then become a chapter in past history.

Although criminal law will not be required in the normatively best world, constitutional law and other branches of law would not only be required but would be ordinary features of daily life. They would provide conditions in which the individual's and the community's moral goals can be freely actualized.

The development of law thus does not consist in the withering away of law. It consists of a dialectics of the realization of one aspect in the withering away of another aspect. The ideals discovered through constitutional and civil law become more and more actual and events and entities described in criminal law become more unlikely to occur. The transformation of criminal law thus occurs in a direction which eliminates its own necessity to exist.

Between constitutional law and criminal law falls civil law. It describes the different types of actions that may be enacted in the present world, on the stage set by constitutional law. Civil law regulates actions in the present world in such a way that none of the rules violate conditions of the ideal world. The legislators generally attempt to do this (i.e. when they are legislating laws and not dictating by fiat). For example the six elements of contract law—offer, acceptance, consideration, competent parties, genuine consent, legal purpose—are all notions based on principles which take human equality, freedom, dignity and independence into account. That is, they are ultimately based on principles of the Community of Ends, some of which are expressed in the present constitutions.

Added to the three divisions is another division in law, but this division is of a different nature. It arises not from the substantive principles of law but from the manner in which all substantive principles are to be applied. The basis of all procedures in law, as we have seen, is in the teleological principle of law.

The laws of procedure are common to all three divisions of law mentioned earlier. Each division is concerned with different issues, hence each division applies the laws of procedure in a different way. In constitutional law the laws of procedure take the form of election laws and amendment laws. In criminal law the laws of procedure appear as the laws governing trials and other criminal procedures; and in civil law as the laws governing civil procedures. Hence, essentially, we have a tripartite division of substantive laws and one separate division of laws of procedures which applies to all.

One must not expect to find such clear boundaries in the way the present *corpus juris* is divided. This is partly because the codification of such texts is conceptually muddled and partly because the makers of these codes tend to follow historical conventions in constructing the codes rather than conceptual ones. However, in whatever manner the present codes are constructed, the divisions mentioned here are all present in these codes in one way or another

Thus, as we see, the grounds for the individuation of laws cannot be understood if we consider only the formal relationships between the state and individuals. We have to know *why* such relationships obtain, i.e. we have to know what ends are intended to be achieved in relating people to each other or the people and the state. An appropriate answer to such questions must I think eventually base itself on the type of considerations presented here.

I proceed now to a discussion of the next and the last important legislative requirement.

IV THE JUDGE'S DUTY

Once we know what the idea of law is and what the legal enterprise is all about, our understanding of the role that the judge is to play in such an enterprise follows naturally from such knowledge.

Being a citizen a judge is, first of all, bound by the same duty as all other citizens, namely the duty to actualize the normatively best possible world; but I mention the judge's duty here because there is something unique about his situation.

There are various offices and stations that have been created within the social structure. The duties and rights attached to each of these stations and offices are specific and special. For example it is the educationist's moral duty to educate as well as he can, the doctor's moral duty to cure people as well as he can, the businessman's moral duty to do honest business, and so on. Each profession and station has its own special duties and rights besides the general moral duties that always oblige all persons commonly. Thus, besides general ethics, we have medical ethics, legal ethics, business ethics and so on; there are also ethics involved in other professions although one may not spell them out clearly. For example there is army ethics, the basic principle of which is that one must be patriotic and fight when ordered. It would be inconsistent to be in the army and refuse to fight on the grounds that one is a pacifist.

Society creates the office of the judge and chooses people for this office for a specific purpose. This office therefore is bound by its own specific duties and rights. The judge's duty is unique in the social structure in virtue of the fact that his office is the only one in society where the duty attached to it is exactly the same as the duty that binds every ordinary citizen. That is, the judge's professional duty and his personal duty as a citizen are one and the same. The duties attached to every other office or profession are different from those that arise from being a citizen. The judge is thus doubly bound by the duty to create the best possible world. He has his own duty and also the duty given to him by society.

In Indian terms this fact can be expressed by the proposition that the judge is the only person whose *samanya dharma* (common *dharma*) is the same as his *varna-ashrama dharma* (the *dharma* of the profession or station).[10] Having this unique two-fold duty the judge is, hence, also entitled to a two-fold correlated right: the right to the protection of the expression of his ideas as an ordinary citizen and the right to the protection of the expression of his ideas through his office. That is, his office must be completely protected from any external force that may limit the actualization of his duties; his office must have complete freedom of speech.

The special right that belongs to the judge's office evidently presupposes that the judge is in fact doing his duty. How do we know whether he is doing his duty or not? This becomes easy to answer because of the unique nature of his office. Since the judge is doubly bound by the duty which binds all citizens and since all ordinary persons are bound by the duty towards the best possible world (the principles of which are specified in the Community of Ends), the judge is acting according to his duty if he is acting in accordance with the principles of the Community of Ends, i.e. acting according to the basic legal propositions.

If the judge's duties are defined by the principles of the Community of Ends and the criteria of the normatively best possible world, which also defines the duties of the ordinary citizens, it follows that by whatever political or administrative means the judge is appointed to his office, his duty and his role remain the same as that of ordinary citizens — to act according to the basic legal principles and actualize the normatively best possible world. It does not under any circumstance become a duty to further the ends of the political party that has appointed him or to further the interest of the administrative bureaucracy that has elevated him to that position.

The judge not only judges persons, he also judges rules. He does this when he reviews the rules legislated by the legitimate authorities. In reviewing such rules his duty does not become any different, it still remains one that binds all ordinary citizens. Hence it is his duty to let only those legislated rules pass as laws which are in accordance with the basic legal propositions. Such rules will increase the freedom, equality and independence of all and maximize the possibility for harmony, diversity, creativity and compossible normative systems in which all are treated as ends and never solely as means.

If a metaphor may be permitted again, the judge acts as a filter between the political system and the legal system. He lets only those rules filter into the legal system which are laws, whether the rules come from legislators, custom or common practice. The judge separates laws from the rules which come from various sources, discards illegitimate rules and gives back laws to the people. He is able to do so by the discriminatory power he has gained through the knowledge of the idea of law and the meaning of the legal enterprise. A judge who is not able to so discriminate evidently does not understand the legal enterprise; he is then acting in accordance with the dictates of politicians or other such people. How well a judge is able to discriminate between a mere rule and a law depends upon how well and how deeply he understands the idea of law.

The frontiers of knowledge about law are just as open as the frontiers of any other branch of knowledge. It is hoped that this work will help in deepening that knowledge and in uniting the search for knowledge with morality once again, a unity which the Indian mind has always recognized but which has unfortunately been broken by positivism and certain misunderstandings about the natural sciences. The schism between knowledge and morality or law is unfortunate because ignorance is the reason for bondage, whether it be personal or social.

REVIEW AND CONCLUSIONS IV

TYPES OF LEGAL THEORIES

The essential characterization of the idea of law has now been completed. These concluding remarks are about the type of legal theory that has been presented in this work and not directly about the idea of law. The aim of these remarks is to place the legal theory in relief by contrasting its basic features with other types of legal theories so that the status of this theory may become more clearly defined.

In his *Prolegomena to any Future Metaphysics* Kant raises and answers the question: 'how is pure mathematics possible?', 'how is natural science possible?', and 'how is metaphysics as a science possible?'[1] He does not raise the question 'how is ethics possible?' or 'how is legal science possible?' Nonetheless he went on to write the *Grundlegung* and the *Metaphysik der Sitten* in which he derived the possibility of morality, like that of mathematics and the natural sciences, from reason itself. Notwithstanding the discrepancy between the questions and answers and assuming that Kant's theory is reasonable and plausible in so far as it derives the possibility of morality from reason, some significant consequences follow for legal science. According to Kant metaphysics as a science is possible if the possibility of synthetic a priori propositions is demonstrated. Further, mathematics and the natural sciences are possible because they are based on their own synthetic a priori propositions. In general any science is possible if its basic synthetic a priori propositions can be shown to describe states of affairs independently of other synthetic a priori propositions which may lie at the foundations of other sciences. It follows therefore that legal science is possible as a pure and independent science only if its basic principles can be shown to be synthetic a priori and independent of all other foundational propositions. Otherwise legal science can at best be a part of political science, theology, sociology or some other social science.

I have tried to show that law has its own synthetic a priori propositions and also that these propositions are independent of other foundational principles. I have therefore attempted to show the possibility of a pure legal science which is neither part of political science nor of theology nor of sociology nor of any other branch of knowledge. The corollary of this conclusion is that only a science based on the basic legal propositions outlined in this work can claim to be a legal science, otherwise it will reduce itself to something else.

Since all basic legal propositions are provided by reason and are also justified within the bounds of reason, the second significant conclusion is that epistemological rationalism, which does not neglect empirical considerations and which does not appeal to any extra-legal authority, is not only tenable but also the only viable theory of law.

Since law is external morality the classification that Kant makes of moral theories also applies to legal theories.[2] All legal theories may be classified into heteronomous legal theories and autonomous legal theories. Heteronomous theories base the grounds of legal obligation on factors other than the individual's capacity to determine his actions. Autonomous legal theories on the contrary justify the basis of legal obligation on the individual's capacity to determine his actions.

Heteronomous legal theories, since they base the grounds for legal obligation on factors other than the individual's will to determine his actions, reduce the obligation into a fear of coercion by others or by some factor in nature. Such reductive theories can be distinguished in terms of the distinctions that have been explored through the work, namely conceptual schemes based on principles of force and conceptual schemes based on principles of nature.

Into the first type of conceptual scheme, as we have seen, fall the theories of Hart, Kelsen and other legal positivists. Since their theories base the grounds of legal obligation on factors other than the individual's own will, they reduce the obligation to external compulsion. Legal obligation in such theories means nothing other than political compulsion, since the external compulsion that they legitimize is the one enforced by the political system. Hence although such heteronomous theories talk about legal obligation they fail to characterize this notion. They are in the final analysis talking only about political coercion and not legal obligation.

A theory that mistakes political coercion for legal obligation may either permit one person to coerce others, or it may permit some to coerce others, or it may permit all to coerce each other. The first type of theory comes from Austin who allows the one sovereign to coerce; the second type from Hart who allows some officials to coerce everyone; and the third type from Marx who allows all to coerce all in the dictatorship of the proletariat.

There can also be heteronomous legal theories which attempt to base the grounds for legal obligation in some sort of utility. Although there have been various heteronomous utilitarian moral theories, a serious and consistent attempt to come up with a heteronomous utilitarian legal theory does not seem to have been made. D. H. Hodgson, for example, explores the consequences of utilitarianism for a legal theory. He argues against the act-utilitarian ethics and shows that rule-utilitarianism is also unsatisfactory for the purposes of a legal theory.[3] However, he maintains nonetheless that a different type of utilitarianism is tenable. Even if one grants his thesis the analysis does not bring out what kind of utilitarianism, if any, can justify the grounds for the obligation to follow the law. To say that one must follow the law, or that one has the obligation to follow the law merely because it is useful, is to assert something which can be seen to be empirically false. To follow what such a theory takes to be law can be of serious 'disutility', for example in following the commands of a dictator, or in more ordinary cases such as paying fines or accepting punishment. In any case, even if one convincingly argued that following the law is useful it would only prove that it is prudential to act according to the law, it would not show why we have an obligation or a duty to follow the law. As I have attempted to show, all heteronomous theories, whether they be based on coercion or utility, are erroneous because they reduce legal asertions to commands or rules of prudence. The notion of legal obligation then turns into either the notion of fear or of external compulsion.

Heteronomous legal theories which attempt to base the grounds for legal obligation on some factor in nature, i.e. the factually possible world, also fail to define the sense of legal obligation. For as we have seen we do not have the choice of either following or not following the laws of nature. The Stoics for example have attempted to base obligation on some factors in nature, but since legal obligation cannot be based on any such factor, such attempts can only lead to arbitrary rules.

A second type of heteronomous theory which attempts to ground the basis of legal obligation in nature is that which eventually grounds it in the will of God. Legal obligation in such a case really becomes the obligation to follow what God wants us to do, not what the individual's will determines for itself. Such a theory obliterates the grounds for the distinction between religious obligation and legal obligation, and in fact it reduces the latter to the former. We have already noted the difficulties with such reductive theories, namely that the notion of 'god' is understood differently by various religions. God's command can be a good reason for action but not a legal reason for action.

The basis for legal obligation can thus neither be grounded in the will of the sovereign nor the will of God. It can only be grounded in what the individual himself wills in accordance with his reason. Such an obligation can only be explained by an autonomous legal theory.

Autonomous legal theories are based on a conceptual scheme applicable to the created social order. However, such autonomous theories cannot take arbitrary forms which conflict with the possibility of reasoning. Autonomous legal theories are usually of two types: i) a conceptual scheme based on individual or communal mystical experiences; ii) a conceptual scheme based on rational principles applicable to the created social order.

Mystical autonomous legal theories appeal to the individual's or the community's experiences in order to justify legal obligation. Mystical autonomous theories seem to show up only infrequently in the Western tradition. For example Milner. S. Ball has recently attempted to justify legal obligation in terms of a Christian notion of 'the Beginning'.[4] Such theories are untenable because they appeal to experiences available only to some individuals. The legal system, being a mode of co-operative reasoning, requires that it be based on experiences which are available to all.

In the Indian tradition mystical autonomous legal theories have been more frequent. In Buddhism for example the idea of *dharma* is grounded in a cosmology which is ultimately intelligible only through some mystical experiences. The difficulty with such a theory is the same as the one with Ball's theory. It grounds itself in experiences which are not publicly available at all times.

The reason why mystical autonomous legal theories are more common in the Indian tradition and heteronomous coercive legal theories are more common in the Western tradition is not too difficult to understand. In the Indian tradition, as argued, the idea of law is mostly confused with some aspects of religious systems which have various mystical elements, and in the West the idea of law is mostly confused with some aspects of political systems which have various coercive elements.

Kant's legal theory has many aspects necessary for an autonomous rationalistic legal theory, but in the end it confuses the grounds for legal obligation. Kant therefore comes up with an autonomous ethical theory but a heteronomous legal theory. Such a position makes Kant's philosophy inconsistent. Since ethics and law are both grounded in pure practical reason, they are both autonomous theories and all heteronomous legal theories are spurious.

The theory that I have presented in this work is a conceptual scheme based on the application of human reason to the created social order. One could refer to it as 'the autonomous theory of law'.

To live by the rule of law, thus, is not to live by the command of the sovereign or the decree of the legislators or the will of God, as theories about law have hitherto asserted. It is to live by the rules of pure practical reason which makes co-operative reasoning possible. Only a community which lives in accordance with these rules lives by the rule of law.

The expression 'rule of law' as used here has a different meaning from what positivists have usually meant by it. Since legal positivism does not specify the basic *rules* of law its use of the expression connotes nothing other than 'the rule of the political authority', where the term 'rule' actually means 'to rule', i.e. to govern. The fact that in English the term 'rule' has this double meaning of principle and governance has added to the confusion in legal positivism. However the inability to get rid of this confusion and specify clearly what is meant by the 'rule of law' in such legal theories need not be assumed to be accidental. Such a confusion helps such theorists to conveniently move from a theory about law (rules) to a theory of government, which, as noted earlier, is not without advantages for the imperialistic history of the rise of legal positivism.

The expression 'autonomous theory of law' has sometimes been used to refer to the view that the judge must have total autonomy. This is not the sense in which it is intended here. I have argued that the judge is bound by certain principles. I use it in its original etymological sense, i.e. a theory that is 'auto' to the 'nomos'. In this sense the theory is a necessary internal requirement of the normatively possible world.

It may rightly be claimed that traditional natural law theories have also attempted to explicate the necessary legal requirements of social reality. In what specific ways then is the view presented here different? Traditional natural law theories have not been clear in distinguishing between the internal (transcendental) conditions for law from the external (transcendent) and empirical conditions.[5] As a consequence, although they have sought to explain and specify certain conditions for the existence and validity of laws, these often relate more to the transcendent aspects of law than to its transcendental aspects. That is, the conditions specified relate more to the external constraints on law than to its internal constraints. However in this work my treatment of traditional natural law theories has been cryptic. This is because my aim has been to explicate the various internal constraints in the existence and the working of the law, and not so much to compare and contrast my views with traditional natural law theories. Such a work would be an important but separate task, and it would be of historical interest. In the context of this work, however, such an undertaking would have required deviations which did not seem necessary for my central aim. Some essential aspects which further distinguish the theory presented here from traditional natural law theories should, however, be mentioned.

At each step I have specified the meaning of 'nature' or 'natural' that is being rejected. These have mainly been to do with propositions which turn out to be synthetic a posteriori—concerning the natural physical world, or analytical a posteriori—concerning customs or conventions which may be asserted to be natural, or analytic a priori propositions which too may be claimed to be natural in some sense. But of course traditional natural law theories have not concerned themselves only with transcendent conditions such as those arising out of the nature of God, or only with empirical conditions such as living according to nature. In so far as traditional natural law theories have specified the internal (transcendental) conditions for law, the view presented here is complementary to them. Thomism for example specifies one very general necessary prescription as a principle of natural law, namely 'do good and avoid evil'. My attempt to deepen our insights into the internal conditions for law is continuous with Thomism and complementary to it in this respect. But Thomism goes on to finally base law on transcendent requirements which constrain the nature of law externally. This is where I part company. The theory presented here confines itself to establishing the final justification for law on the very possibility of a co-operative social life in which a co-operative social reasoning is actualized as an on-going process. The grounds for law, thus, are justified independently of all religious, customary and dogmatic beliefs. It is important to note that although there may be transcendent forces regulating human behaviour, the special knowledge of which one may claim on some religious grounds, such forces can be assumed to be regulating legal behaviour only in ways which do not contradict the internal transcendental conditions of law. Otherwise such transcendent regulation too will become arbitrary and despotic. One may of course freely speculate on the transcendent forces which may be assumed to regulate legal behaviour, but such speculation will belong to what Kant called 'speculative reason'. Speculative reasoning, as Kant has argued, will not suffice as knowledge which can serve the practical purposes of guiding human reason in action, especially where legal action is concerned. Since law has its own justification and teleology, and since even an external transcendent force has to abide by its principles, from the point of view of the theory presented here it does not really matter whether or not any transcendent force other than man exists.

Unlike Thomism, Grigorio Del Vecchio seeks to establish the conditions for law by looking inwards, towards the ontological status of man. Here the transcendent conditions are sought in the nature of man alone, and not in any external factors.[6] Although this kind of moral idealism rightly elevates the moral and legal status of the self, in the final analysis it leads to subjectivism. The subjectivism to which Del Vecchio's theory leads has two major shortcomings. First it fails to provide an understanding of how the self is related to others in a community; and second it fails to provide objective principles on the basis of which one can understand the activities of the community as a whole. His moral idealism is thus not wrong, it is incomplete in a major way. Although it clearly grasps the common factors involved in *being* individuals, it loses sight of the common factors in the individual and the communal *becoming* which is manifested in co-operative human reasoning and other social activities.

Moral idealism which emphasizes the status of the individual self but neglects the role of reason is more common in Indian ethical theories than one usually finds in Western theories. Such Indian theories would face the same practical difficulties that one confronts in Del Vecchio's views.

One may compare F.S.C. Northrop's legal theory to that of Del Vecchio's. Northrop, who is attracted to the objectivity of mathematical principles, leads us in the opposite direction.[7] He, like many other deontic logicians who seem to be similarly fascinated by mathematical objectivity, seeks objective principles in the social sciences like those of the mathematical sciences. Such Cartesianism loses sight of the ontology involved in the social sciences. It neglects the social status of the person and thus deprives itself of any understanding of the teleology involved in the metaphysics of the self and of the community.

An appropriate legal theory must overcome the shortcomings in both directions. It must retain the ontology of the self and the community and at the same time it must also be able to provide, with sufficient explanation, the objective principles commonly employed by human reason. The theory presented in this work attempts to achieve such a synthesis; and in so far as it succeeds, it is distinct from both the natural law theories of the type presented by Del Vecchio and of the type presented by Northrop.

Some major aspects of this work have been developed with reference to Kant's views, hence in the concluding remarks it seems important to distinguish my views from some recent neo-Kantian theories.

Kelsen reacted against the sociology of law and sociological jurisprudence in general and attempted to present a theory based on Kantian epistemology. However, as I have tried to show, although he distinguished the normative sciences from the natural sciences in a Kantian manner, in the final analysis his theory cannot be called Kantian because his view of the transcendental and the a priori aspects of epistemology is very different from that of Kant's. Moreover he accepted ethical relativism, which too contradicts Kant's ethics. Therefore the usual claim that Kelsen's legal theory is neo-Kantian is without grounds. To establish the view that there are internal transcendental conditions which are (morally) necessary to law, one has to show how ethical relativism is mistaken. Ethical relativism is inconsistent with a view that there are some principles which apply to law universally. I have not discussed Kelsen's account of ethical relativism, but I have in fact attempted to counteract what seems to me to be the most serious argument leading to ethical relativism, namely Quine's criticisms of synthetic a priori propositions. Basic moral and legal propositions which are not relative but which are true for all moral and legal systems are, as we have noted, a type of synthetic a priori proposition.

A more important type of neo-Kantian attempt is to be found in the works of Gustave Radbruch. Radbruch has drawn connections between the autonomous spirit and the jural reality by viewing law as a value-related phenomena of culture.[8] Radbruch's distinction between value and reality is similar to Kelsen's distinction between imputation and causality, and both these distinctions parallel Kant's distinction between freedom and causality. However although Radbruch, like Kelsen, begins by making Kantian distinctions, he too ultimately accepts ethical relativism, thus moving away from the core of Kant's epistemology of absolute synthetic a priori principles.

It is doubtful if Radbruch's or Kelsen's ethical relativism is consistent with their views about democracy or cultural liberalism. Both democracy and liberalism would, I think in the end require the assertion of certain absolute principles, especially those concerning rights and duties. A discussion of these issues is evidently matter for another occasion. Here it should suffice to mention that although I have not discussed ethical relativism within Radbruch's works, I have directly dealt with the problems raised by ethical relativism, scepticism and agnosticism. The legal theory presented here is hence distinguishable from such neo-Kantian views.

If points of similarity are to be found between my view and a neo-Kantian view, I think one would be most justified in turning to Rudolf Stammler.[9] But I must emphasize here that although I have not discussed Stammler's views, there are just as many differences as there are points of similarity between his and my analysis. Some of these differences are radical. To mention a few, even though Stammler perceives law as an internal and necessary aspect of social reality, in the end, like positivists and the natural law theorists, he fails to provide a criterion for a clear distinction between a legal system and a coercive system. Consequently he lacks a theory for being able to clearly distinguish between the arbitrary coercion of the state or of the political system and the legally justified coercion of the sovereign. The second crucial difference is that Stammler makes the characterization of the concept of law a formal task of pure reason. My analysis, which is more in keeping with Kant's views, confines the task of characterizing and discovering the idea of law to practical reason alone. Thirdly, I have presented the teleology of law not as a social ideal but as providing methodological principles which are as internal to legal actions as are the basic structural principles. This point has essentially an Indian orientation. Fourthly, since Stammler does not provide us any epistemological criteria to distinguish customs and conventions from what he calls 'right law', in the final analysis his system allows for a relativism in law whose boundaries are not perfectly defined. An imperfect and open-ended boundary between customs and 'right law' leads not only to relativism but also eventually to scepticism about his natural law theory. My analysis distinguishes the basis of customs and conventions from the basis of law; hence although it accepts and expects relativism in customs and convention it clearly delimits the boundary of what can be called proper law, including what can be called a proper legal method.

In these and various other ways I hope it will be clear that my presentation of the idea of law goes much beyond Stammler's, and also that it is essentially different from his. These remarks obviously do not do justice to Stammler's works, which are complex and voluminous. Only a separate work on him could justifiably unravel the depth of his thought. However I think Gustav Radbruch is not entirely unjustified in asserting that Stammler provides us only a programme for a theory of law and not the theory itself. I have attempted to execute some of Stammler's important programmes as efficiently as possible.[10]

It is likely that despite my efforts to distinguish my view from those of natural law theorists, critics may still not grant that my work has been an appropriate advancement on natural law theories. I will not quarrel with such critics, but I would like to point out again that this is not a natural law theory, it is a theory that is natural to law. A theory that is natural to law must certainly develop out of natural law theories and legal positivism, just as chemistry develops out of alchemy. Such a development is inevitable because the desire for a pure theory which is natural to law, i.e. a theory which can show the autonomy and the purity of legal theory by distinguishing it from political, religious, customary and other social contigencies, is, as I have tried to show, a moral requirement for the development of the human family. Law as *dharma* is the only basis on which a co-operative and peaceful international kinship can be established. I am sure that others with a deeper understanding will be able to carry out this task to much greater satisfaction than I have done. I take myself only to have initiated this task.

NOTES TO THE INTRODUCTION

1. See Joseph Raz, *Concept of a Legal System*. Oxford: Clarendon Press. 1970. See also his *Authority of Law*. Oxford: Clarendon Press. 1979.
2. John Finnis, *Natural Law and Natural Rights*. Oxford: Clarendon Press. 1980.
3. See Eric Stokes, *The English Utilitarians and India*. London: Oxford University Press. 1959.
4. See Sir J. Fitzjames Stephen's letters of 1 March 1883 and 4 January 1878 to *The Times*. See also 'J. Fitzjames Stephen,' in Sir William Wilson Hunter, *Life of Mayo*. London: Smith, Elder & Co.1875. Vol. II, p. 169.
5. See H.L.A. Hart, 'Positivism and the Separation of Law and Morals.' 71 *Harvard Law Review*. 593, pp. 606–15. 1958.
6. Immanuel Kant, 'Uber den Gemeinspruch: Das mag in Theorie richtig sein, taugt aber nich fur die Praxis.' Translated by E.B.Ashton as *On the Old Saw: That may be Right in Theory but it won't work in Practice*. Philadelphia: University of Pennsylvania Press. 1974.
7. For some interesting discussions of the notion of authority, see R. Baine Harris ed., *Authority: A Philosophical Analysis*. Alabama: University of Alabama Press. 1976. See also Frederick J, Adelmann, S. J., ed., *Authority*. The Hague: Martinus Nijhoff. 1974.

NOTES TO PART I

1. Aristotle, *Analytica posteriora*, in W.D.Ross, ed., *Works*, trans. G.R.G. Mure. Oxford: Clarendon Press. 1927–52. Vol. I.
2. Rene Descartes, *Meditation on First Philosophy*, and *Discourse on Methods*, in *The Philosophical Works of Descartes*, trans. E.S. Haldane and G.R.T. Ross. Cambridge: Cambridge University Press. 1931.
3. For a detailed analytical account of the natural sciences see Ernest Nagel, *The Structure of Science*. New York: Harcourt Brace & World, Inc., 1961.
4. For a detailed analysis of formalism and non-formalism see Joseph, Horovitz, *Law and Logic: A Critical Account of Legal Arguments*. New York: Springer Verlag. 1972.
5. Stephen Edelston Toulmin, *The Use of Arguments*. Cambridge: Cambridge University Press. 1964. See also his *The Philosophy of Science: An Introduction*. London: Hutchinson University Library. 1967.
6. Chaim Perelman, *Justice, Law and Argument* (Synthesis Library, V. 142), Dordrecht, Holland: D. Reidel Pub. Co. 1980.
7. For some discussion on axiomatic systems see Alfred Tarski, *Introduction to Logic and the Methodology of the Deductive Sciences*, trans. Olaf Helmer. New York: Oxford University Press. 1966. See also his *Logic, Semantics and Metamathematics* (Papers from 1923 to 1938), trans. H.H. Woodger. Oxford: Clarendon Press. 1956 To compare Tarski's account with a recent one, see

Susan Haack, *Philosophy of Logics*. Cambridge: Cambridge University Press. 1978.

8. R. Dworkin, 'No Right Answer', in Hacker and Raz, eds., *Law Morality and Society: Essays in Honour of H.L.A. Hart*. Oxford: Clarendon Press. 1977 See also his 'Can Rights be Controversial', in *Taking Rights Seriously*. Cambridge Mass.: Harvard University Press. 1977.
9. See for example, I Tammelo, *Outlines of Modern Legal Logic*. Wiesbaden: Franz Steiner Verlag. GMBH. 1969, p. 90; J. Raz *Authority of Law*, p. 61; J.C Smith, *Legal Obligations*. Toronto: Toronto Press. 1976, p. 209; Raz, *Concept of a Legal System*. Oxford: Clarendon Press. 1970, p. 170.
10. See J.L. Austin, *How to do Things with Words*. Eds. J.O. Urmson and Marina Sbisa. Cambridge University Press. 1957. See also, J.R. Searle, *Speech Acts*. Cambridge: Cambridge University Press. 1969. In the Indian tradition the *Mimansika* philosophers, who have been concerned with the interpretation of Vedic injunctions and the *Dharmasastras*, have for long recognized the significance of performative utterances. The literature is extensive.
11. Taken from *Martin's Annual Criminal Code. 1979*. Agnicourt: Canada Law Books Limited. 1979.
12. Taken from *Model Penal Code (Proposed Official Draft)* Philadelphia, Pa.: The American Law Institute. 1962.
13. See for example, Ilmar Tammelo, *Outlines of Modern Legal Logic*.; J.C. Smith, *Legal Obligations*.
14. Lon L. Fuller, *The Morality of Law*. New Haven, London: Yale University Press, 1964, p. 39.
15. Ulrich Klug, *Juristische Logik*. 2nd. edn. Berlin-Gottingen, Heidelberg. 1958
16. Georg Henrik von Wright, *An Essay in Deontic Logic and the General Theory of Action*. Amsterdam: North-Holland Pub. Co. 1968. *Norm and Action: A Logical Inquiry*. New York: Humanity Press. 1963. 'Deontic Logic,' *Mind*.60. (1951), pp. 1–15. 'A New System of Deontic Logic.' *Danish Year Book of Philosophy*. 1964. pp. 173–82; Alf Ross, *Directives and Norms*. London: Routledge & Kegan Paul. 1968, pp. 78–105; Alan Ross Anderson, *The Formal Analysis of Normative Systems*. (Technical Report No. 2, Contract No SAR/Nonr–609, 16). Office of the Naval Research Group, Psychology Branch. New Haven. 1956. Rept as *Logic of Decisions and Actions*; N. Rescher, ed., Pittsburgh: University of Pittsburgh. 1967.
17. See for example, Anderson Ross, 'A Reduction of Deontic Logic to Alethic Modal Logic.' *Mind*.67. (1958), pp. 100–3.
18. Stig Kanger, 'New Foundations for Ethical Theory' in Risto Hilpinen, ed., *Deontic Logic: Introduction and Systematic Readings*. Dordrecht Holland: D. Reidel. 1971.
19. Ingmar Porn, *The Logic of Power*. Oxford: Basil Blackwell. 1967. I Tammelo, *Modern Legal Logic*. 1969.

NOTES TO PART II

1. Carlos. E. Alchouron, and Eugenio Bulygin, *Normative Systems*. New York: Springer Verlag. 1971.

2. Rudolf Carnap, *The Logical Syntax of Language*, trans. Amethe Smeaton. London: Routledge and Kegan Paul. 1967.
3. The original sense of the term 'feat' is similar to the non-scholastic use of the Latin *factum*, which is the subjunctive use of the noun singular of *factus* or the past participle of 'facere' i.e. *DO*. The word 'feat' in the sense used here is derived from the original Old French *fait*, *fet* or later, *fact*. See *Oxford English Dictionary*, Vol. IV, p. 118. I am using the word in sense 1 only. *Oxford English Dictionary*. Oxford: Clarendon Press. 1961
4. The word fact is used here in the sense in which the Romanic equivalent of *factum*, as used in scholastic Latin, has been traditionally used. As distinguished from the non-scholastic use, *factum* in scholastic Latin is restricted to refer to occurrences whose existence is independent of the activities of human beings. See *Oxford English Dictionary*, Vol. IV, p. 12. I am using the term 'fact' in senses 4, 5, 6, and 7 only, and not in senses 1, 2, and 3. Senses 1, 2, and 3, of *factum*, i.e. the sense in which 'fact' means a deed accomplished, still finds place in modern legal discourse as 'legal facts'. If consistency in language is to be maintained, 'legal facts' should actually be called 'legal feats', since the term 'fact' is not used in the old sense any more.
5. Lon L. Fuller. *The Morality of Law*, p. 39.
6. Ibid., p. 39.
7. Ibid., p. 39.
8. The notion that law is a hierarchy of norms permeates Kelsen's legal thory, but see specifically *Pure Theory of Law*, pp. 193–278.
9. Evgeny B. Pashukanis, *Law and Marxism*, trans. Barbara Einhorn. London: Inks and Links. 1978, pp. 85–108.
10. H.L.A. Hart, *The Concept of Law*. Oxford: Clarendon Press. 1961, pp. 77–96.
11. Ibid., pp. 113, 151.
12. Rolf Sartorius, 'Hart's Concept of Law.' 52 *Archiv Fur Rechts Und Sozialphilosophie*. 161 (1966).
13. Lon L. Fuller, *The Morality of Law*, p. 129. See also his 'Positivism and Fidelity to Law'. *71 Harv. L. Rev.*, pp. 630, 661–9. (1958).
14. Lon L. Fuller, *The Morality of Law*, p. 129.
15. Milner S. Ball, *The Promise of American Law*. Athens: University of Georgia Press. 1981.
16. Robert S. Summers, 'Professor Fuller on Hart and Morality.' 18 *J. Legal Education*. 1 (1966).
17. For some discussions and explications in English see: Alain Danielou, *The Ragas of North India*. London: Barrie & Rockcliff. 1968. Robin Cooper, 'Abstract Structure of the Indian Raga System.' *Ethnomusicology*, Vol. XXI, No. 1. Jan. 1977. S. Harold Powers, 'Language Models and Musical Analysis.' *Ethnomusicology*, Vol. XXIV, No. 1. Jan. 1980.
18. See for example, I Tammelo, *Modern Legal Logic*, p. 90.
19. Any talk about a counter-example of course presupposes that a legitimate or a valid sentence is one that is in actual use, not the one that a generative grammar may provide. Anyone who takes his generative grammar to be truly applying to the language would have to argue that the conditions for legitimacy or validity for a true sentence in the language is provided by his

grammar, that the use may sometimes err. A counter-example would then not be a counter-example but a grammatically false sentence. A Chomskyan theory would argue that its grammar provides valid or legitimate sentences for a language. See Noam Chomsky, *The Syntactic Structures*. The Hague: Mouton. 1965.

20. Friedrich Waismann, 'Verifiability', in Antony Flew, ed., *Logic and Language*. Garden City, New York: Doubleday. 1965.
21. *International Covenant on Civil and Political Rights*. General Assembly Resolution 2200 A (XXI). Article. 5.
22. Hans Kelsen, *Pure Theory of Law*, p. 352.
23. Ibid., pp. 353–5.
24. Ibid., p. 350
25. C.K. Allen, *Law in the Making*. Oxford: Clarendon Press. 1964. 7th. edn., pp. 482–530.
26. Ibid., p. 491.
27. Ibid., p. 526.
28. C.P. Curtis, 'A Better Theory of Legal Interpretation.' 3, *Vand. L. Rev*. 407. (1950). Gidon Gottlieb, *The Logic of Choice*. London: George Allen and Unwin. 1968. The view that I have presented here bears upon the following discussions also: O.W. Holmes, *Collected Legal Papers*. New York: Peter Smith. 1952, pp. 203–4. J. Frankfurter 'Some Reflections on the Reading of Statutes.' 47. *Col.L.Rev*. 527 (1947). Edwin H. Sutherland, *Statutes and Statutory Constructions*. John Lewis, ed. 2nd.edn. Chicago: Callaghan. 1904. Karl N. Llewellyn *The Common Law Tradition*. Boston: Little Brown. 1960. pp. 24–6, 226.
29. Gidon Gottlieb, *The Logic of Choice*, p. 91.
30. C.P. Curtis, 'A Better Theory of Legal Interpretation.' pp. 407, 424.
31. H.L.A. Hart, 'Theory and Definition in Jurisprudence.' 29, *Proceedings of the Aristotelian Society*. Suppl. Vol. 1955. pp. 258–64.
32. Hans Kelsen, *Pure Theory of Law*, pp. 195–6.
33. Ibid., p. 196.
34. Panini, *Astadhyâyi*, ed. and trans. by Otto von Bohtlingk, Leipzig 1887. Reptd. Hildesheim: Georg Olms. 1964. —Trns. L. Renou. I–III. Paris. 1948–54. See also Hartmut, Scharfe, *Panini's Metalanguage*. Philadelphia. American Philosophical Society. 1971. Vidya Niwas Misra, *The Descriptive Techniques of Panini*. The Hague: Mouton. 1966.
35. For a detailed explication of the notion of a cybernetical system see, for example, Frank Honywill George, *The Foundations of Cybernetics*. London: Gordon and Breach. 1977. V.L. Parsegian, *This Cybernetic World*. Garden City, New York: Doubleday & Co., Inc. 1972. W. Ross. Ashby, *An Introduction to Cybernetics*. London: Chapman & Hall. 1970.

Notes to Review and Conclusions II

1. Each of these Reviews and Conclusions is a second order note within this work about legal theories, whereas the body of the work is about the idea of law. Notes about legal theories have hence been separated from the

description of the idea of law. This point is only of structural importance in terms of the levels of discourse within this work. It may be ignored for all other purposes and the work must be read as one continuous discussion

2. Lon L. Fuller and Robert Braucher, 'The Role of Contract in the Ordering Process of Society Generally.' in *Basic Contract Law*. St. Paul, Minn. West Pub. Co. 1964. Also in *The Principles of Social Order*. Ed Kenneth I Winston Durham, N.C.: Duke University Press. 1981, pp. 170–87.
3. See the relevant discussions in, Fuller, 'Human Interaction and the Law.' *American Journal of Jurisprudence*. Vol. 14. 26 September 1969 Also in Kenneth I. Winston, ed. *The Principles of Social Order*, pp. 212–46.
4. Winston pp. 16–23.
5. Ibid., p. 33.
6. Ibid., pp. 30–3.

NOTES TO PART III

1. See W.V. Quine, 'Two Dogmas of Empiricism,' *The Philosophical Review*. Vol. 60. 1951. Morton G. White, 'Analytic Synthetic: An Untenable Dualism,' in Sydney Hook, ed., *John Dewey: Philosopher of Science and Freedom*. New York: Dial Press. 1950, pp. 316–60.
2. For Leibniz's view see Couturat, ed., *Opuscules et fragments inedits de Leibniz*. Paris: Felix Alcan. 1903, pp. 16–22. Also, T.V. Smith and Marjorie Green, trans. & eds., *Philosophers Speak for Themselves—From Descartes to Locke*. Chicago: University of Chicago Press 1957, pp. 306–12. For Kant's view see *Critique of Pure Reason*, trans. Norman Kemp Smith. London: Macmillan & Co. 1953, pp. 41–55. (B1–B30, A1–A16).
3. See Saul Kripke, 'Naming and Necessity,' in Donald Davidson and Gilbert Harman, ed., *Semantics of Natural Languages*. Dordrecht, Holland: D. Reidel. 1972. Also his 'Identity and Necessity', in Milton K. Munitz, ed., *Identity and Necessity*. New York: University Press. 1971. pp. 135–69.
4. N.R. Hanson, 'The Very Idea of Synthetic a Priori,' *Mind* XXI. 1962, pp. 521–4.
5. The process involved in conceiving the necessity expressed in analytic propositions raises various problems. Three different points of view concerning these issues can be examined by comparing the views of Quine, Chomsky and Piaget. See W.V. Quine, and J.S. Ullian, *The Web of Belief*. New York: Random House. 1970; also Quine, *From a Logical Point of View*. Cambridge: Harvard University Press. 1953; and his *Mathematical Logic*. Cambridge: Harvard University Press. 1951. J. Piaget, *The Construction of Reality in the Child*. New York: Basic Books, 1954; Piaget and B. Inhelder. *The Child's Conception of Space*. London: Routledge & K. Paul. 1976; Noam Chomsky, *Language and Mind*. New York: Harcourt Brace & World. 1968; Chomsky, *Cartesian Linguistics: A Chapter in the History of Rationalistic Thought*. New York: Harper & Row. 1966.
6. Immanuel Kant, *Metaphysic of Morals*, Part I, translated as *The Metaphysical Elements of Justice* by John Ladd. New York: Bobbs-Merrill Co. 1965, pp. 51–72.

7. Ibid., p. 57.
8. This is the famous Goldbach conjecture about numbers. I find it interesting that this relationship obtains between prime numbers, although I have not understood why. Perhaps the observation is mathematically trivial and it may not be true for all prime numbers. The point however is not about numbers. It concerns the thesis that analytic propositions are not informative. If there is a proof for this observation then, evidently, one has been informed about something new, even if the proof is totally deductive.
9. An understanding of what is a transcendental argument in Kant's philosophy would, I think, involve a study of the whole of his *Critique of Pure Reason*, for besides the epistemological aspects of the transcendental arguments (which alone have been mentioned in this work), there are also its ontological and metaphysical aspects. The following sections in the first *Critique* may, however, be noted since they are directly relevant here: A 84 (B117) – A 95 (B129); A 737 (B765); A 190 (B233)–A 211 (B256). There are various discussions about the transcendental arguments. The following important ones may, however, be noted: P. Crawford, 'Kant's Theory of Philosophical Proof.' *Kant Studien*. 1961–2. M. S. Grams, 'Transcendental Arguments.' *Nous*. 1971. Vol. 4. No. 1. B. Strouds, 'Transcendental Arguments.' *The Journal of Philosophy*. 1968. Vol. LXV. No. 9. S. Korner, 'The Impossibility of Transcendental Deduction.' *Kant Studies Today*. La. Salle, Ill.: Open Court. 1969, pp. 230–44. E. Schaper, 'Arguing Transcendentally.' *Kant Studien*. 1972. J. Hintika, 'Transcendental Arguments: Genuine and Spurious.' *Nous*. 1972. Vol. 6. No. 3.
10. Pierre Duhem, *The Aim and Structure of Physical Theories*. Trans. P. Weiner. New York: Atheneum. 1962.
11. W.V.O. Quine, 'Two Dogmas of Empiricism,' in *From a Logical Point of View*, pp. 42–3.
12. One form of the liar's paradox is 'I only speak lies.' Am I then speaking the truth or a lie? The barber's paradox is that there is a barber who shaves all those who do not shave themselves. Does the barber shave himself?
13. See for example, Peter O'Neii, *Fundamental Concepts of Topology*. New York: Gordon and Breach Science Publishers. 1972, pp. 247–57.
14. For a detailed discussion about different types of necessity, see Alvin Platinga, *The Nature of Necessity*. Oxford: Clarendon Press. 1974. For a detailed discussion about metaphysical necessity see Milton Fisk, *Nature and Necessity*. Bloomington: Indiana University Press. 1973.
15. S. Kripke, 'Naming and Necessity'. See also Hilary Putnam, 'Meaning and Reference', *The Journal of Philosophy*. LXX (8 Nov. 1973).
16. John Locke, *An Essay Concerning Human Understanding*, ed. A.C. Fraser. New York: Dover. 1959. Vol. II, pp. 22, 296–7.
17. C.I. Lewis. *An Analysis of Knowledge and Valuation*. La Salle, Ill.: Open Court. 1946, pp. 39–40.

Notes to Review and Conclusions III

1. The essential arguments are developed by John Austin in his *The Province of Jurisprudence Determined*, 1832. New York: Noonday Press 1954
2. H.L.A. Hart. 'Legal and Moral Obligations', in A.I. Melden, ed., *Essays in Moral Philosophy*. Seattle: University of Washington Press, 1958, pp 82 107.
3. John Austin, *The Province of Jurisprudence Determined*, pp 186 ff.
4. H.L.A. Hart, *The Concept of Law*, p. 107.
5. Ibid., p. 104.
6. Ibid., pp. 86–8.
7. Ibid., pp. 189–95.
8. Martin P. Golding, *Philosophy of Law*. Englewood Cliffs, New Jersey: Prentice Hall, Inc. 1975, p. 46.
9. Hans Kelsen, *Pure Theory of Law*, p. 201.
10. Ibid., p. 202.
11. Ibid.
12. Immanuel Kant, *Critique of Pure Reason*, trans. Kemp Smith, p. 96. (A56–57, B80–82.)
13. Hans Kelsen, *Pure Theory of Law*, p. 202 (emphasis is mine).
14. Ibid., pp. 219–21. See also p. 111ff. for Kelsen's account of delict.
15. This account of Dworkin's view is based mainly on his *Taking Rights Seriously*. Cambridge, Mass: Harvard University Press. 1977.
16. John Finch, *Introduction to Legal Theory*. 3rd edn. London: Sweet & Maxwell, 1979, pp. 136–44.
17. Wittgenstein's own position concerning the different spheres of discourse and his other relevant philosophical views are set out in his *Philosophical Investigations*, trans. G.E.M. Anscombe, 3rd edn. Oxford: Basil Blackwell, 1968.
18. I have discussed some basic problems facing the Wittgensteinian approach as it concerns normative problems in Chhatrapati Singh, 'Can Wittgenstein's Philosophy Yield a Theory of Justice?' in Edgar Morscher and Rudolf Stranzinger, eds., *Ethics: Foundations, Problems and Applications*. Vienna, Austria: Holder-Picher-Tempsky. 1981.
19. H.L.A. Hart, *The Concept of Law*, pp. 189–95.
20. Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, ed. Chris Arthur, trans. Barbara Einhorn. London: Inks & Links: 1978.
21. See *Soviet Legal Philosophy*, trans. Babb. Intro. by Hazard. Twentieth Century Legal Philosophy Series. Cambridge, Mass: Harvard University Press. 1951. Vol. 5, pp. 303ff.
22. V.I. Lenin, *State and Revolution*. The Little Lenin Library, Vol. 14. New York: International Publishers. 1932.
23. Karl Marx, *Capital*. London: Lawrence and Wishart. 1972. Vol. III, p. 793.
24. See Hans Kelsen, *The Communist Theory of Law*. New York: Frederick A. Preaeger, Inc. 1955, p. 6.
25. Karl Marx, Friedrich Engels: *The Communist Manifesto*, ed. A.J. P. Taylor. Pelican Books. 1967.

NOTES TO PART IV

Notes to Section I

1. For an explication of the transcendenatal, metaphysical and empirical requirements, see Kant's *Critique of Pure Reason*. A 218 (B 265) - A 226 (B 274).
2. Lon L. Fuller, *The Principles of Social Order*, ed. Kenneth. I. Winston. Durham, N.C.: Duke University Press, 1981.
3. J.N. Findlay's work traces the origin of some basic Kantian concepts, such as that of 'the thing in itself', and that of the 'noumena'. Kant mentions 'older' and 'ancient' thinkers on these issues in his *Inaugaral Dissertation of 1770*. See J.N. Findlay, *Kant and the Transcendental Object: A Hermeneutic Study*. Oxford: Clarendon, Oxford University Press. 1981. See also Irving I. Polonoff, *Forces, Cosmos Monads and Other Themes in Kant's Earlier Thought. Kantstudien Erganzugshefte*-107. Bonn: Bouvier Verlag Herbert Grundmann. 1973.
4. For a detailed account of the history of ancient Greek thought I have found Dillon's work very helpful. See John Dillon, *The Middle Platonists*. Ithaca, New York: Cornell University Press. 1977. Hostler's detailed discussion of Leibniz's moral philosophy is helpful in locating the historic roots of Leibniz's ideas, See John Hostler, *Leibniz's Moral Philosophy*. London: Duckworth. 1975.
5. A. Foucher de Careil, *G.W. Leibniz-Nouvelles lettres et opuscules inedits*. Paris, 1857, p. 171.
6. E. Bodemann, *Die Leibniz Handschriften in der Königlichen Öffentlichen Bibliothek zu Hannover*. Hildesheim. 1966, p. 58.
7. C.I. Gerhardt: *Die philosophischen Schriften von G.W. Leibniz*. Halle. 1860. Vol. VI, p. 242.
8. G.W. Leibniz, *Theodicy*, ed. Diogenes Allen, trans. E.M. Huggard. Don Mills. Ont.: J. M. Dent. Dent University Paperbacks. 1966.
9. H. Grotius, *De iure belli ac pacis*. Amesterdam. 1712. Prol.11.
10. G.W. Leibniz, *Samtliche Schriften und Briefe*. Preussisches Akademie der Wissenschaften. Berlin. 1923. Vol.VI.i, p. 431.
11. G. Grua, *G.W.Leibniz-Textes inedits*. Paris. 1948, p. 665.
12. L. Dutens, *G.G. Leibniti opera omnia* ... Geneva. 1768. Vol. IV.3, p. 273.
13. C.I. Gerhardt, *Die philosophischen Schriften von G.W. Leibniz*. Halle. 1860. Vol. VII, p. 304.
14. According to Leibniz there is only one percept of justice which is expressed in God's wisdom, but there are two basic percepts of logic: the principle of contradiction and the principle of compossibility.
15. The notion of metaphysical harmony here is not to be confused with Leibniz's thesis about the pre-established harmony, the view that the perception of a given monad corresponds with those of all the others. For a clear distinction of the two senses see G. Grua: *G.W. Leibniz—Textes inedits*, p. 12.
16. Bryce S. DeWitt, 'Quantum Mechanics and Reality,' *Physics Today*. Vol. 23, No. 9, pp. 30-5.
17. Brandon Carter, 'Large Number Coincidences and the Anthropic Principle

in Cosmology,' in *Confontration of Cosmological Theories with Observational Data: Proceedings of the Second Copernicus Symposium*, ed. M.A. Longair Dordrecht: D. Reidel Publishing Co. 1974. See also the interesting discussion on possible worlds by George Gale, 'The Anthropic Principle', *Scientific American*. Dec. 1981. Vol. 245, No. 6, pp. 145-71.

18. Nelson Goodman, *The Ways of World Making*. Sussex: Harvester Press 1978.
19. Benjamin Lee Whorf, *Language, Thought and Reality*. ed. John B. Carroll. Cambridge, Mass.: M.I.T. Press. 1956.
20. F.M.A. Voltaire, *Candide*, ed. J.H. Brumfitt. London: Oxford University Press. 1968. Chap. 19.
21. M.N. Bouillet, *Les Enneades de Plotin*. Paris. 1857. Vol. I, pp. 431ff.
22. C.I. Gerhardt, *Die philosophischen Schriften von G.W. Leibniz*. Halle. 1860. Vol. VII, p. 114.
23. The status and the function of criminal law is indeed a complex issue: a detailed discussion of its nature will follow in the subsequent sections.
24. The point that I am making here would have been easier to present if the term 'fact' had retained a consistent use in the English language. In 'artifact' the term 'fact' is being used in the original sense of the Latin 'factum,' which means a deed or a feat. The term 'artifact' should hence really be 'artifeat', since 'fact' in English has been chosen not to be used in the sense of 'deed'. The term 'artifeat' clearly conveys what is meant, i.e. articles created by the feats of human beings. The term 'artifact' can mislead one into believing that what is being talked about concerns facts, or the factually possible world.
25. Peter Geach, *The Virtues*. London: Cambridge University Press. 1977, pp. 90-9, Cf. p. 98.
26. Leslie Armour, 'Necessity and the Concept of God,' in *Papers of the Michigan Academy of Science*, Arts and Letters. Vol. LI. 1966. See especially the author's 'A Reply to Professor Mavrodes.' *Papers of the Michigan Academy of Science, Arts and Letters*. Vol. LI. 1966.
27. Sometimes analytic a posteriori propositions are presented as if they were necessary, like synthetic a priori propositions. In such cases people find themselves bound to a custom or a tradition and think that they have to necessarily abide by it, that either that is the only way of doing things or that there is no way of changing the customs or the tradition. One can observe that propositions concerning arranged marriages, dowries, family structures, professional division of labour, etc. are often presented as a priori, necessary propositions. The people concerned tend to think that there is no other way of doing things. A proposition which seems to have caused great harm by presenting itself as a necessary and a priori proposition seems to me to be Article II (B. Amendments of the Constitution) of the American Constitution. It reads: 'A well-regulated militia being necessary to the security of a free state, the right of the people to bear arms shall not be infringed.' This is evidently a logically false argument. If a well-regulated militia is what is necessary for the security of the free state, then it follows that it is the militia which has the right to bear arms or which needs arms, it does not follow that *the people* as a whole have a right to bear arms. From the premise that the *militia* needs arms, two erroneous conclusions are drawn: not only that *the*

people need arms but, moreover, even that they have a *right* to bear arms! If the whole of *the people* are treated as if they constituted the militia, then violence as a way of life is what one would naturally expect, for it is natural for the *militia* to be violent.

28. Immanuel Kant, *Metaphysik der Sitten*, Royal Prussian Academy in Berlin edition. Vol. VI. See especially the 'Introduction', pp. 211–28.
29. Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*. Royal Prussian Academy edition. Vol. IV, pp. 431–4.
30. Immanuel. Kant, *Religion innerhalb der Grenzen der blossen Vernunft*, translated by Theodore M. Green and Hyot H. Hudson as *Religion Within the Bounds of Reason Alone*. New York: Harper & Brothers. Harper Torchbooks. 1960. Book III, pp. 85–9.
31. Immanuel Kant, *Kritik der Urtheilskraft*, translated by J.H. Bernard as *Critique of Judgement*. New York: Hafner Publishing Co. 1951, pp. 279–86.
32. G.W. Leibniz, *Principles of Nature and of Grace, Founded on Reason* (1714), trans. Mary Morris. New York: Everyman's Library, Dutton. 1956, pp.21–3.
33. Jean Baruzi, *Leibniz*. Paris: Bloud. 1909, pp. 365–8.
34. I Kant, 'Disputato de mundi sensibilis atque intelligibilis forma et principiis,' in *Inagural Dissertation of 1770*, trans. W.J. Eckoff. New York: Columbia College. 1894.
35. I. Kant, *Metaphysische Anfangsgrunde der Naturwissenschaft*. Translated by J. Ellington as *Metaphysical Elements of Natural Science*. New York: Bobbs-Merrill Co. Inc. 1966.
36. I. Kant, *Inaugural Dissertation, and Early Writings on Space*, trans. John Handyside. Chicago: OpenCourt Publishing Co. 1929, pp. 68–9. (Reprinted Westport Conn: Hyperion Press Inc. 1977).
37. I. Kant, *Grundlegung zur Metaphysik der Sitten*. Royal Prussian Academy edition. Vol. IV, pp. 420–1.
38. Ibid., p. 421.
39. I. Kant, *Critique of Pure Reason*, A 236 (B295)–A260 (B315).
40. I. Kant, *Grundlegung*, pp. 449–57.
41. Ibid., p. 458.
42. I. Kant, *Kritik der praktischen Vernunft*. Royal Prussian Academy edition. Vol. V, pp. 4–14.
43. Ibid., pp. 42–51.
44. Ibid., pp. 58.
45. I. Kant, *Metaphysik der Sitten*. Vol. VI, pp. 248–52.
46. I. Kant, *Inagural Dissertation and Early Writing on Space*. Para. 19.
47. I. Kant, *Metaphysik der Sitten*. Vol. VI, pp. 245–57.
48. I. Kant, *Critique of Pure Reason*. A80 (B106) and A211 (B257)–A215 (B262).

Notes to Section II

1. I. Kant, *Grundlegung*, pp. 446–8.
2. Ibid., pp. 397–8.
3. The term 'ethics' has been generally used in three different but related ways, signifying (i) a general pattern or way of life, (ii) a set of rules of conduct, i.e. a 'moral code', and (iii) inquiry about a way of life and of conduct: in this

sense it is sometimes also called 'metaethics'. I am using the term through this work only in the second sense. For a detailed discussion about the different approaches to ethics in the three different senses, see *The Encyclopedia of Philosophy*, ed. Paul Edwards, V.3., 'Ethics, History of', by Raziel Abelson and Kai Nielsen. See also, V.3., 'Ethics, Problems of', by Kai Nielsen. For a detailed discussion of Kant's use of the term 'ethics' see Mary J. Gregor, *Laws of Freedom*. Oxford: Basil Blackwell, 1963, pp. 2–33.

4. I. Kant, *Metaphysik der Sitten*, p. 214.
5. I. Kant, 'Uber den Gemeinspruch: Das mag in Theorie Richtig Sein, taugt aber nicht fur die Praxis', trans. H.B. Nisbet in *Kant's Political Writings*. Cambridge: Cambridge University Press. 1970. This work is also translated by E.B. Ashton as *On the Old Saw: That may be Right in Theory but it won't work in Practice*. Philadelphia: University of Pennsylvania Press. 1974. (I shall refer to the work generally as *Theory and Practice*. Page references shall as usual be to the Royal Prussian Academy edition). Vol. VIII, pp. 298–9.
6. I. Kant, *Metaphysik der Sitten*, p. 230.
7. Ibid., pp. 216; 222.
8. Ibid., p. 218.
9. I. Kant, *Handschriften Nachlass*. Royal Prussian Academy edition in Berlin. Vol. 23, p. 377.
10. I. Kant, *Metaphysik der Sitten*, pp. 229–31.
11. Ibid., pp. 218–21.
12. I. Kant, *Theory and Practice*, p. 300.
13. Patrick Devlin, *The Enforcement of Morals*. London: Oxford University Press. 1965.
14. I. Kant, *Metaphysik der Sitten*, p. 230.
15. Ibid., p. 231.
16. Ibid., p. 232.
17. Ibid., p. 231.
18. Ibid., p. 232.
19. For a detailed analysis of Kant's moral theory see H.J. Paton, *The Categorical imperative*, London: Hutchinson. 1963.
20. I. Kant, *Grundlegung*, pp. 436–7.
21. Ibid., p. 436.
22. I. Kant, *Critique of Pure Reason*. A64 (89)–A181 (B224).
23. I. Kant, *Metaphysik der Sitten*, p. 230.
24. I. Kant, *Zum ewigen Frieden*, Anhang II, *Werke*, Vol. viii, p. 370 ff. Translated by Lewis White Beck as '*Perpetual Peace*' (See Appendix II) in *Kant on History*, Indianapolis: Bobbs-Merrill, 1963.
25. I. Kant, *Grundlegung*, pp. 436–7.
26. Ibid., p. 437.
27. Ibid., p. 421.
28. Ibid., p. 421.
29. Ibid., p. 431.
30. Ibid., p. 429.
31. Ibid., p. 434.
32. Ibid., p. 433.
33. I. Kant, *Religion Within The Bounds of Reason Alone*, pp. 85–9.
34. I. Kant, *Theory and Practice*, p. 290.

35. I. Kant, *Metaphysik der Sitten*, p. 314.
36. John Rawls, *A Theory of Justice*. Cambridge, Mass.: Harvard University Press. 1971.
37. Karl Marx, *Das Kapital*.
38. Jean Jacques Rousseau, *The Social Contract*, ed. Lester G. Crocker. New York: Pocket books. 1967. See specially Book II: iii, vi; Book IV: i, ii.
39. John Locke, *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press. 1960. Besides the passages mentioned, see also 124; 125; 126; 127.
40. Ibid., p. 89.
41. Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott. London: Macmillan. 1962, pp. 229–36.
42. For some related discussions see G. Jeffrie Murphy, *Kant: The Philosophy of Right*. London: Macmillan. 1970, pp. 113–27.
43. *Leviathan*, pp. 129–33.
44. I. Kant, *Theory and Practice*, p. 306.
45. Ibid., p. 297.
46. Fredrick Pollock, *Principles of Contract*. 5th.edn. Toronto: Carswell. 1889, p. 1.
47. *Sutton and Shannon on Contracts*. 7th.edn. London: Butterworth. 1970, p.3.
48. Percy Henry Winfield, *Province of the Law of Tort*. Cambridge: Cambridge University Press. 1931, p. 380.
49. This seems to be the commonly accepted legal view, despite Maitland's opinion to the contrary. For Maitland's view see F.W. Maitland, *The Constitutional History of England*. Reptd. Cambridge: Cambridge University Press. 1974.
50. 'Restatement of Contracts' No. 1 of The American Law Institute.
51. Fifoot-Chesire, *The Law of Contract*. 8th edn. London: Butterworth. 1972.
52. *Chitty on Contracts*. 23rd. edn. Vol.I.: General Principles. London: Sweet and Maxwell. 1968.
53. 'Curie. v. Misa'.: *Law Review*. (1875). 10.Ex.153, 162.
54. H.L.A. Hart, *The Concept of Law*, p. 41.
55. I have discussed the notion of co-operation in detail in my M.A. thesis (unpublished) entitled 'Logical Conditions of Social Activity'. One essay from this text, which has been published, is of relevance here. See Chhatrapati Singh, 'Communication: The Autotelicity of the Basic Mode of Social Activity.' *Indian Philosophical Quarterly*. Vol.V, No.III. April 1978.
56. See *The Oxford English Dictionary*. Oxford: Clarendon. 1961. Vol. V, p. 639, for 'just,' and then p. 594 for 'join'. A more detailed etymological study is to be found in: Eric Partridge, *Origins*. New York: Macmillan & Co.1966. See p. 325, No. 7 for 'just', but mainly p. 321 for 'join'.
57. See *Pramatha Nath Mullick v. Pradymna Kumar Mullick*. (1925) *L.R.Ind*. App. 245. Discussed by P.W. Duff in 3. *Camb. L.J.* (1927). 42.
58. See cases concerning roosters and caterpillars in G.W. Keeton, *The Elementary Principles of Jurisprudence*. 2nd. edn. London: Pitman. 1949, p. 149.
59. R. Ihering, *Geist des romischen Rechts*. Leipzig, 1872, Vol. I, p. 202. Trans. O.De Meulenaere as *L'esprit du Droit Romain*. Paris: Mareseg. 1880.

60. Hans Kelsen, *Pure Theory of Law*, pp. 168–91.
61. Otto von Gierke, *Natural Law and Theory of Society* Reptd. Becon Hill, Boston: Becon Press. 1957.
62. H.L.A. Hart, 'Definition and Theory in Jurisprudence'. 70. *L.Q.R.* (1954), p. 37.
63. Hans Vaihinger, *Der Philosophie des Als Ob*. Berlin, 1911. Trans. C.K Ogden as *The Philosophy of As If*. 2nd edn. Reptd. New York: Barnes & Noble. 1966.
64. Lon L. Fuller, *Legal Fiction*. Stanford Calif.: Stanford University Press. 1967.
65. What I have said here about the notion of a legal entity is a detailed discussion of some of the essential points made earlier in Chhatrapati Singh, 'The Ontology of Law' in *Language and Ontology*. Vienna, Austria: Holder-Picher-Tempsky. 1982.
66. I. Kant, *Grundlegung*, pp. 434–7.
67. Ibid., p. 435.
68. H.J. Paton, *The Categorical Imperative*. 6th edn. London: Hutchinson. 1963, pp. 168–9.
69. Jeffrie G. Murphy, *Kant: The Philosophy of Right*. London: Macmillan. 1970, pp. 80–6.
70. I. Kant, *Metaphysik der Sitten*, p. 213.
71. I. Kant, *Critique of Practical Reason*, pp. 121–2.
72. Ibid., pp. 124–33.
73. Kant argues that evil cannot be an essential attribute of man since he is capable of morality. See his *Religion Within the Bounds of Reason Alone*, pp. 15–79. However, he does not seem to realize the significance of this view for his legal theory as presented later in his *Metaphysik der Sitten*.
74. For a discussion of the concept of *ataman* in English, see Troy Wilson Organ, *The Self in Indian Philosophy*. The Hague: Mouton & Co. 1964.

    The continuity of the human will with the divine will is not accepted by many schools of Indian philosophy. The *Visist-Adavita-Vedanta* of Ramanuja and others, for example, sees a distinction between the will of *Iswara* and the *Jiva*. The *Nyaya* school of Gautama, Udyotakara and others accepts a similar view. On the other hand the thesis about the continuity of the wills is not foreign to Western philosophy. Hegel, Schopenhauer and many other thinkers share this view. In fact its clearest expression can be traced back as far as Origen, if not further. See Origen, *On First Principles*. Trans: C.W. Butterworth. Gloucester, Mass: Peter Smith. 1973. Bk II, Chap. I, Sec. III, pp. 76ff.
75. I. Kant, *Metaphysik der Sitten*, pp. 245–57.
76. For a detailed discussion of Kant's idea of the self, see N.K. Banerjee, *Kant's Philosophy of the Self*. New Delhi Arnold-Heinemann. 1974.
77. Alan Donagan, *The Theory of Morality*. Chicago: Chicago University Press. 1977.

Notes to Section III

1. I. Kant, *Critique of Judgement*, trans. J.H. Bernard. New York, Hafner Publishing Co. 1961, p. 10 (II).

2. Ibid., p. 15 (IV).
3. Ibid., p. 32 (IX).
4. Ibid., p. 243–8 (74, 75).
5. Ibid., p. 222 (66).
6. Ibid., p. 286 (84).
7. See for example, J.D. McFarland, *Kant's Concept of Teleology*. Edinburgh: University of Edinburgh Press. 1970.
8. I. Kant, 'Essay Towards a Universal History from a Cosmopolitian Point of View.' Trans. by Lewis White Beck in *Kant on History*. Indianapolis: Bobbs Merill. 1963.
9. George Gale, 'The Anthropic Principle'. *Scientific American*. Dec. 1981. Vol. 245, No. 6, pp. 145–71. I have discussed the related issues earlier in Section I.
10. For some relevant discussions see S.N. Dasgupta, *A History of Indian Philosophy*. Cambridge: Cambridge University Press. 1922. Vol. I, Ch. 4.
11. See M.K. Gandhi, *The Story of my Experiments with Truth*. Trans. Mahadev Desai. Ahmedabad: Navajivan Press. 1940.
    —— *Satyagraha in South Africa*. Trans. Valji Govindji Desai. Madras: S. Ganesan. 1938.
    —— *Non-Violence in Peace and War*. Ahmedabad: Navajivan Press. 1942.
    —— *Delhi Diary*. Ahmedabad. Navajivan Press. 1948. For A detailed discussion of the notion of *satyagraha* see Joan V. Bondurant, *Conquest of Violence*. Los Angeles: University of California Press. 1971.
12. See Lon L. Fuller, 'The Role of Contract in the Ordering Process of Society Generally,' in *Basic Contract Law*. St. Paul, Minn.: West Publishing Co. 1947. Also reprinted in Kenneth I. Winston, ed., *The Principles of Social Order*. Durham, N.C.: Duke University Press. 1981.

Notes to Section IV

1. I have discussed some basic questions related to this issue in Chhatrapati Singh, 'The Idea of Political Representation,' *De Philosophia*. September 1981. No. 2.
2. Hans. Kelsen, *Pure Theory of Law*, p. 10. See also pp. 193–214.
3. H.L.A. Hart, *The Concept of Law*, p. 86.
4. Ibid., p. 113.
5. Ibid., p. 203. Cf. pp. 187–207.
6. J. Hall, 'Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes.' *Journal of Legal Education*. 5, p. 329, (1953).
7. See Glanville Williams, ed., *Salmond on Jurisprudence*. London: Sweet Maxwell, 1957, pp. 532–7.
8. See G.W. Paton, and David P. Derham, ed., *Jurisprudence*. Oxford: Clarendon, 1972, pp. 354–6.
9. Eugene V. Rostow. *The Ideal in Law*. Chicago: The University of Chicago Press. 1978.
10. See Rajendra Prasad, 'The Theory of Pursartha: Revaluation and Reconstruction.' *Journal of Indian Philosophy* 9 (1981), pp. 49–76.

Notes to Review and Conclusions IV

1. See I. Kant, ***Prolegomena to any Future Metaphysics***. Trans. Lewis White Beck. Indianapolis, New York: Bobbs-Merrill Co. 1950, p. 27 (pp. 279 280 in the Royal Prussian Academy edition).
2. I. Kant, ***Grundlegung***, pp. 440–5.
3. D.H. Hodgson, ***Consequences of Utilitarianism***. Oxford: Clarendon Press 1967.
4. Milner S. Ball, ***The Promise of American Law***. Athens: University of Georgia Press. 1981.
5. I am using the distinction between 'transcendental' and 'transcendent' in the manner employed by Kant. For Kant's view, see I. Kant, ***Critique of Pure Reason***, A 12,296; B 25,351.
6. See G. Del Vecchio, ***General Principles of Law***. Trans. F. Forte. Boston: Boston University Press. 1958.
7. See F.S.C. Northrop, ***The Complexity of Legal and Ethical Experiences***.
8. See G. Radbruch, ***Rechtsphilosophie*** (1932), in 20th Century Legal Philosophy Series, ***The Legal Philosophy of Lask, Radbruch and Dabin***. Trans. K. Wilt. 1950.
9. See Rudolf Stammler, ***Die Lehre von dem Richtigen Rechte*** 1932, 2nd edn. 1926.
10. Gustav Radbruch, ***Rechtsphilosophie***. 3rd edn. 1932, p. 24.

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————, *The Concept of Truth*. Assen, The Netherlands: Van Gorcum & Comp. 1972.

————, 'Necessity and the Concept of God'. In *Papers of the Michigan Academy of Science, Arts and Letters*. Vol. LI. 1966.

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————, (and others). *Les Fondement des Droits de l'home*. Firenze, La Nuova Italia. 1966.

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